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INDIAN HEIRSHIP LAND PROBLEM

GOVERNMENT

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON

INTERIOR AND INSULAR AFFAIRS

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1392

A BILL RELATING TO THE INDIAN HEIRSHIP LAND PROBLEM

AUGUST 9 AND 10, 1961

Printed for the use of the
Committee on Interior and Insular Affairs



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INDIAN HEIRSHIP LAND PROBLEM

WEDNESDAY, AUGUST 9, 1961

U.S. SENATE,
SUBCOMMITTEE ON INDIAN AFFAIRS,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 3110, New Senate Office Building, Senator Frank Church presiding.

Present: Senators Church, Anderson (chairman of the full committee), Burdick, Gruening, and Allott.

Also present: James H. Gamble, professional staff member.

Senator CHURCH. This morning the subcommittee is beginning hearings on S. 1392, a bill I have introduced relating to the Indian heirship land problems.

In order that those who will read these proceedings may fully understand what the subcommittee has been doing in regard to heirship, I would like to set out a chronology of our activities.

Beginning in the 1st session of the 86th Congress, the staff of this committee was instructed by the then chairman of the committee, Senator Murray of Montana, to engage the assistance of the Library of Congress and to undertake a comprehensive survey of Indian heirship lands and the problems associated with multiple ownership of Indian allotments.

A series of questionnaires were prepared by the staff, designed to elicit all pertinent information and opinions relating to administrative problems arising from fractionated ownership of allotments and the use being made of such lands. Responses to those questionnaires were compiled in part I of the study entitled "Indian Heirship Land Survey of the 86th Congress, 1st Session," and a complete analysis of the material was made and printed in part II. These two volumes were widely distributed among Indian tribes and others early in this session of Congress. The findings of our study were as follows:

1. Approximately 6 million acres of land is now in heirship status and another 6 million acres will become heirship land in the near future unless prompt action is taken.
2. The heirship problem is not only present in surface ownership of land but also in mineral ownership.

3. Requiring all heirs to sign lease or sale papers is one of the foremost obstacles to the American Indian in utilizing his heirship land and to the Federal Government in administering it.

4. The heirs themselves have expressed an active interest in the problem as evidenced by the 38,871 requests for various actions made to Bureau of Indian Affairs officials during fiscal year 1958.

5. Most local jurisdictions of the Bureau feel that present authority is inadequate to solve the problem and are almost unanimous in recommending corrective legislation.

6. Some tribal councils have evidenced an interest in this problem as it relates to consolidation of the tribal land base.

7. Continuing to hold allotted Indian lands in trust or restricted status without any consideration given to the individual's ability to manage his own land without supervision is serving to intensify the heirship problem.

At my direction, the committee staff prepared legislation designed to resolve many of the problems which the heirship study disclosed plagued the owners of undivided interests in allotments and the Bureau of Indian Affairs in the management of these lands. The staff informed me that in the drafting of S. 1392 particular attention was paid to produce legislation that would—

(1) Solve the major problems brought to light in the studies, yet afford maximum opportunity to retain Indian land in Indian ownership.

(2) Avoid any violation of the Indian's constitutional rights as a citizen.

(3) Not provoke any situation that might result in hundreds of cases before the Court of Claims by individual Indians who might feel they were not fairly treated.

(4) Not bring about a situation where Congress will be besieged for hundreds of private bills to issue fee patents.

And the bill that was introduced based upon the committee's work, as you know, was S. 1392, the subject of the hearing today.

H.R. 6569, the companion measure, was introduced in the House.

So that Indian tribes and others directly concerned with this problem would be apprised of our activities, I had prepared a memorandum to the members of the full committee containing excerpts from the statement I made on the Senate floor at the time S. 1392 was introduced. The memorandum contained the entire text of the proposal and explanatory material of the various sections of the bill.

More than 9,000 of these committee prints, entitled "Indian Heirship Land Survey," were mailed to tribal officials, tribal attorneys, Indian organizations, and officials of the Department of the Interior so that they would be fully informed of the results of our 2-year study. I might add that in sponsoring this bill I made it clear that S. 1392 was a vehicle for the purpose of exploring further the viewpoints and wishes of the people most affected by the problem.

While this committee was attacking the heirship situation from the standpoint of administrative problems, the House Committee on Interior and Insular Affairs was approaching the problem in a different fashion. The staff of the House committee prepared a questionnaire that was directed to the Indian owners of allotted land in heirship status in an effort to learn as much as possible about the experiences

they have had with heirship land and what the Indians want done with the property they have inherited. Some 50,000 questionnaires were mailed out, and 9,001 usable returns were fully analyzed. The analysis of the questionnaires is contained in House Committee Print No. 27, of the 86th Congress, 2d session, entitled "Indian Heirship Land Study."

I want to emphasize that the legislation before us was prepared on the basis of the information contained in these two studies and is the result of 4 years of intensive review of the overall heirship problem. I do not know of any aspect of Indian affairs that has undergone a more thorough and detailed examination.

S. 1392 was submitted to the Department of the Interior, the Bureau of the Budget, the Department of Justice, and the General Accounting Office for departmental reports. The reports have been received and will be incorporated in the hearing record with the bill following my statement. Also, I believe it would be helpful if we included the committee print which I had prepared explaining the bill, S. 1392, and its various provisions.

A few weeks ago the Task Force on Indian Affairs submitted its report to Secretary of the Interior Udall. Among the recommendations made by the task force was the need for corrective legislation in the matter of heirship lands. The Secretary in turn expressed his deep interest in remedial legislation. Therefore, I scheduled these hearings and announced through a general press release and a statement in the Congressional Record—copies of which will be placed in the record—that we intended to move ahead in this area in an attempt to report a bill during this session of Congress.

The Department of the Interior, the Department most directly concerned in this matter, has submitted a substitute bill in its report. As we proceed in our consideration of this matter, I believe this subcommittee will want to pursue all viewpoints and suggestions, including direct testimony and recommendations on S. 1392.

And I might say in that connection that we will, of course, use these hearings for the purpose of fully examining the substance of the substitute which has been recommended by the Department of the Interior.

Senator ALLOTT. Would the chairman yield at that point?

Senator CHURCH. I will be happy to yield.

Senator ALLOTT. Mr. Chairman, this meeting has been called and the notice was on S. 1392, which is the only bill before the Senate, but I wonder if it wouldn't accelerate our own progress and perhaps help if we could have an understanding that we were not limiting comments in this matter entirely to this Senate bill. We do not have H.R. 8077, of course, before us, but at the same time I would regret having all of these witnesses here and considering S. 1392 and then be in the position of having to repeat the entire process with H.R. 8077 at another time, or the substance of it, if it should be introduced in the Senate.

What would be the Chair's thinking on this subject?

Senator CHURCH. I concur wholeheartedly in the statement made by the Senator from Colorado. Of course, it is not possible for us to consider other bills because only one bill is presently before the Senate. Therefore, this hearing has been called to consider the bill that

is pending before this committee, S. 1392. However, the administration's substitute has been introduced in the House as the Senator has pointed out, H.R. 8077, and since we are looking for a solution to the heirship problem, we should take into full consideration all aspects of the substitute proposal and utilize this hearing for that purpose. And I think we made that clear in the announcements that have heretofore gone out concerning this hearing.

I concur wholeheartedly that we should examine the full problem, the full scope of the problem, and give such latitude as is needed to the substitute proposal made.

Senator ALLOTT. It might possibly involve just a little more time here, but I think in the long run it will greatly expedite the investigation of this matter.

Thank you, Mr. Chairman.

Senator CHURCH. I agree wholeheartedly.

The material to which I referred in my opening statement will be inserted at this point in the record.

(The exhibits are as follows:)

[S. 1392, 87th Cong., 1st sess.]

A BILL Relating to the Indian heirship land problem

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. That upon the request of any owner of an Indian interest in any tract of land in which any undivided interest is held by the United States in trust for an individual Indian or an Indian tribe, or in which any undivided interest is held by an individual Indian or an Indian tribe subject to a restriction against alienation imposed by the United States, the Secretary of the Interior is authorized and directed to partition or to sell all undivided Indian trust or restricted interests in the land, unless the Secretary finds that such a partition or sale would not be in the best interests of the Indian owners and reports annually to the Congress the basis for his finding in each case. Any interest in oil, gas, or other minerals that is reserved to an Indian owner in any sale made pursuant to this section shall be reserved in a nontrust and unrestricted status, unless the Secretary makes the determination referred to in subsection 10(b). The Secretary is authorized to execute all appropriate title documents for sales made pursuant to this section, and to distribute the proceeds of such sales in accordance with the regulations applicable to individual Indian moneys. No sale under the provisions of this section shall include any mineral estate that has been reserved to any Indian tribe by other provisions of law.

SEC. 2. The Secretary may, when he deems it in the best interests of the Indian owners, obtain a power of attorney from the owner of a non-Indian or unrestricted interest in the land to be sold authorizing the Secretary to sell and convey such interest.

SEC. 3. For the purposes of this Act, the Secretary may represent any Indian owner who is a minor, or who is non compos mentis, and after giving reasonable notice by publication of the proposed sale, he may represent an Indian owner who cannot be located.

SEC. 4. All sales of lands authorized by section 1 of this Act shall be by competitive bid, except that a sale may be made to one of the owners of an interest in the land, or to the tribe within whose reservation the land is located, at not less than the appraised value of the land if none of the owners after reasonable notice objects. If a timely objection is made, the sale shall be by sealed, competitive bid, subject, upon request made prior to the solicitation of bids, to the right of the tribe or any of the Indian owners to ask immediately after bids are opened that the land be sold at auction, in which event auction bidding shall be limited to persons who submitted sealed bids in amounts not less than 75 per centum of the appraised value of the land, the Indian owners, and the tribe. The highest sealed bid shall be considered the opening auction bid. No sale shall be made unless the price is substantially equal to the appraised value. Title to any land purchased by a tribe may be taken in trust for the tribe if it is located

within the boundaries of the reservation. Title to any land purchased by an individual Indian, or by a tribe if the land is outside the boundaries of the reservation, shall be taken in the name of the purchaser without any restriction on alienation, control, or use, unless the Secretary makes the determination referred to in subsection 10(b) with respect to an individual Indian.

SEC. 5. (a) In order to assist tribes that wish to purchase land offered for sale under the provisions of this Act, the Secretary of the Interior is authorized to make a loan to any tribe under the conditions stated below, provided the tribe does not have funds available in an amount that is adequate to make the purchase and is unable to obtain a loan from other sources. Such loan shall be made from the revolving funds referred to in section 9 of this Act.

(b) The amount of the loan shall not exceed the appraised value of the land plus the value of any other property the tribe may mortgage or pledge as security for the loan.

(c) The tribe shall give to the United States a mortgage on the land purchased with the loan, and on any other tribal property which the Secretary deems necessary to secure the loan adequately.

(d) The loan shall be for a term of not to exceed twenty-five years, and shall bear interest at a composite rate consisting of (1) a rate equal to the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the month in which the loan is made, as such rate is determined by the Secretary of the Treasury, plus (2) a rate, to cover losses and administrative expenses, determined by the Secretary of the Interior, which rate shall be not less than one-half of 1 per centum and not more than 1 per centum. The loan need not require repayment in equal installments, but it shall require repayment according to a schedule that will fully amortize the loan within the time specified. In the event of a default in the repayment of the loan, the Secretary of the Interior shall take such action as he deems necessary to protect the interests of the United States. If during the period of repayment the tribe is awarded a money judgment against the United States in excess of the unpaid balance of the loan, the entire unpaid balance shall be collected from the appropriation to satisfy the judgment.

(e) Before a loan is made the tribe shall submit for approval of the Secretary of the Interior a master plan for the use of all lands to be purchased. Any tribe preparing a plan may call upon the Secretary for technical assistance, and the Secretary shall render such assistance as may be necessary. Such plan shall include provision for consolidation of holdings of the tribe, or acquisition of sufficient lands in conjunction with those held to permit reasonable economic utilization of the land and repayment of the loan. The Secretary shall not approve a tribal plan unless it is agreed to by a majority of adult tribal members, both on and off the reservation, who vote in a referendum for that purpose. Such plan may be revised from time to time with the approval of the Secretary, but without the need for a referendum.

(f) The cost of managing any land purchased by a tribe pursuant to this Act shall be borne by the tribe and not by the United States.

SEC. 6. Any tribe that adopts, with the approval of the Secretary of the Interior, a plan pursuant to subsection 5(e) of this Act, or any other plan that does not involve a loan from the United States but which provides for the consolidation, management, use, or disposition of tribal land, is hereby authorized, with the approval of the Secretary of the Interior, to sell any tribal land or other property in furtherance of such plan.

SEC. 7. The Secretary of the Interior shall approve no plan pursuant to this Act that contains any provision that will prevent or delay a termination of Federal trust responsibilities with respect to the land during the term of the plan.

SEC. 8. Nothing in this Act shall repeal any authority to sell trust or restricted land that is conferred by any other provisions of law.

SEC. 9. (a) All funds that are now or hereafter a part of the revolving fund authorized by the Act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1968), and the Act of April 19, 1950 (64 Stat. 44), as amended and supplemented, including sums received in settlement of debts of livestock pursuant to the Act of May 24, 1950 (64 Stat. 190), sums collected in repayment of loans heretofore or hereafter made, and sums collected as interest or other charges on loans made, shall hereafter be available for loans to organizations of Indians, Eskimos, and Aleuts (hereinafter referred to as Indians), having a

form of organization that is satisfactory to the Secretary, and to individual Indians of one-quarter degree or more of Indian blood who are not members of or eligible for membership in an organization that is making loans to its members, for any purpose that will promote the economic development of such organizations and their members, or the individual Indian borrowers.

(b) The appropriation authorization in section 10 of the Act of June 18, 1934 (48 Stat. 986), is hereby amended by increasing it from \$10,000,000 to \$50,000,000.

SEC. 10. (a) In order to prevent the problem of multiple ownership of undivided interests in Indian trust and restricted land from growing as rapidly as it has grown in the past, and at the same time protect the land ownership interests of Indians who need special protection, the provisions of this section shall apply notwithstanding any other provision of law.

(b) In any case of transfer of title to Indian trust or restricted land or an interest therein by inheritance or devise, the title shall pass by operation of law in a nontrust and unrestricted status unless the Secretary of the Interior determines before the close of the probate proceeding that the Indian heir or devisee lacks ability, knowledge, experience, and judgment to manage his business affairs with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing his property or the benefits thereof.

(c) The Secretary of the Interior shall not approve any acquisition by an Indian of title to land or an interest in land in a trust or restricted status unless he makes the determination referred to in subsection (b) of this section.

(d) The Secretary of the Interior shall not extend by a general order applicable to a class of Indians a trust period that would otherwise expire on or after January 1, 1964, and a trust period that expires prior to such date shall not be extended beyond that date by a general order. After January 1, 1964, a trust period shall be extended only by an order applicable to specified individual Indians and only on the basis of the determination referred to in subsection (b) of this section. Any extension of a trust period on an individual basis after January 1, 1964, may be for such term of years as the Secretary of the Interior deems appropriate, for the life of the individual, or until the individual reaches the age of 21, subject to the right to terminate the trust in accordance with the provisions of this Act or any amendment thereof or supplement thereto.

(e) Any trust or restrictions on the title of an individual Indian that do not extend for a stated number of years or for an ascertainable term shall terminate on January 1, 1964, unless extended by the Secretary of the Interior in accordance with subsection (d) of this section.

(f) The Secretary of the Interior shall review, as rapidly as possible, each trust or restriction on title to land or an interest in land that extends beyond January 1, 1964, and he shall terminate the trust or restriction on title unless he makes the determination referred to in subsection (b) of this section. Thereafter, the Secretary of the Interior shall continue to make such reviews in order to keep his determinations current.

(g) If the Secretary of the Interior terminates the trust or the restrictions on title to land or an interest in land owned by an Indian (and for this purpose a failure to extend a trust period shall not be regarded as a termination), the Indian may apply to the United States district court for the district in which the land is located for an order setting aside the Secretary's action, and the court shall have jurisdiction to issue such order if, in its judgment, the Indian does not meet the standard referred to in subsection (b) of this section.

(h) The Secretary of the Interior is authorized to issue such orders, documents, or evidences of title as he may deem appropriate to carry out the provisions of this section.

SEC. 11. This Act shall become effective six months after the date of enactment. During this interim period, the Secretary of the Interior shall notify each Indian tribe of the rights afforded by this Act in order that the tribe may make its plan for consolidating Indian holdings. Upon the conclusion of each Indian probate proceeding after the date of this Act, the Secretary shall also notify each Indian heir of the rights afforded by this Act.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., July 10, 1961.

HON. CLINTON P. ANDERSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR ANDERSON: Your committee has requested a report on S. 1392, a bill relating to the Indian heirship land problem.

We recommend that in lieu of S. 1392 Congress enact a bill along the lines of the enclosed substitute draft. The principal provisions of the substitute draft and the manner in which they differ from S. 1392 are as follows:

1. The substitute draft states a general policy with respect to the use and management of Indian trust and restricted lands. That policy is to use the lands productively for the support and advancement of the Indian beneficiaries. Although there should be no question about this policy, we feel that it needs to be stated and emphasized. When seeking a solution to the heirship problem it is important that we find a solution that will allow the land to be used by the Indians to the maximum extent feasible.

2. One part of the heirship problem relates to economically unproductive lands. Multiple ownership of a tract of land often interferes with its productive use, with the result that the land is either unused or ineffectively used. Land in this status contributes little or nothing to the welfare of the Indian owners.

The substitute draft provides that such unproductive land can be sold by the Secretary to the tribe that occupies the reservation where the land is located. The sale would require the consent of none of the multiple owners. The sale would be for the appraised fair market value, and payment would be in installments over a period of years out of income from the land, with a minimum annual payment required to be made out of tribal income generally.

This provision would accomplish three things:

(a) The Indian owners who are now receiving little or no benefit from the land will be benefited when the tribe puts the land to a productive use. Although the payout period may be spread over a number of years, the individual Indians will receive some income from the land and they are receiving none now.

(b) The tribe will be in a position to consolidate land use areas into economic units and make a much more productive use of the land than is possible under present circumstances.

(c) The procedure will require no appropriation of Federal funds.

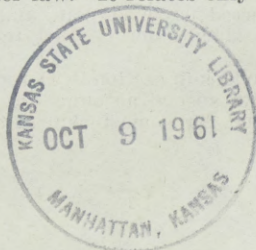
S. 1392 would meet this part of the heirship problem by authorizing Federal loans to tribes that want to purchase heirship lands that are offered for sale. The loans would be for 25 years and bear interest. We believe that it is unnecessary and undesirable to draw upon the Federal Treasury for this purpose. Acquisition by a tribe under an installment payment contract with the seller is a more reasonable approach in the case of lands that are not now productive.

3. A second part of the heirship problem relates to the lack of adequate tools for Federal administration of land in multiple ownership—i.e., for trust conservation of assets. At the present time a number of different statutes specify different rules with respect to the consent required from multiple owners before the land can be leased, the timber sold, or a right-of-way granted.

The substitute draft cuts through this confusing and difficult administrative system by providing that if a lease, timber sale, or right-of-way is otherwise authorized by law, and the need for obtaining the consent of multiple owners is interfering with the effective use of the land, the Secretary may execute the lease, timber sale, or right-of-way without the consent of the Indian owners.

We believe that this is an essential administrative tool for any trustee. It is not logical to impose upon the Secretary a trust responsibility for managing Indian land and at the same time deny him the authority to take ordinary prudent action when ownership interests become fractionated.

This provision does not authorize leases for any purpose or for any term that is different from those authorized by other law. It relates only to the consent of the multiple owners.



S. 1392 contains no comparable provision, and a provision of this kind is needed from the standpoint of an attack on the Federal management problem.

4. A third part of the heirship problem relates to the partition and sale of heirship lands when they are not idle and unproductive (or, if idle, the tribe does not want to buy them).

(a) The substitute draft authorizes administrative partition or sale by the Secretary upon the application of Indians who own a majority interest in the lands.

S. 1392 authorizes such action upon application of any one owner.

We believe that in an administrative proceeding by the Secretary, who has a trust responsibility to all of the owners, the majority principle is the more reasonable one. In a judicial proceeding, however, we agree that the normal State rule which allows any one owner to start the proceedings should apply. That is our comment No. 4 below.

(b) The substitute draft authorizes the administrative partition or sale only if it would be in the best interests of the Indian owners and not detrimental to the local Indian community.

S. 1392 requires the partition or sale unless the Secretary finds and reports to Congress the basis for his findings that the partition or sale would not be in the best interests of the Indian owners. The bill does not refer to the detrimental effect on the local Indian community.

We believe the substitute draft represents the more reasonable approach.

(c) The substitute draft gives the tribe a preferred right to purchase at the appraised value.

S. 1392 contains a more detailed sales procedure that gives a first preference to the coowners, and allows the tribe to compete for the acquisition of the land in an auction.

We believe the substitute draft represents the preferable approach in that it assures the individual Indian owners of a fair price and also recognizes the legitimate interest of the tribe in acquiring the land at a fair price.

5. In connection with the administrative partition, sale, and lease authority, there is the problem of the non-Indian owner of an unrestricted interest. This problem has two aspects:

(a) In the case of administrative partitions, sales, and leases, the substitute draft provides that the Secretary may partition, sell, or lease the non-Indian interests along with the Indian interests. We believe that the undivided nature of the Indian and non-Indian interests gives Congress sufficient power to legislate in this way.

S. 1392 provides that the Secretary may sell the non-Indian interest only if he obtains a power of attorney from the owner. We believe that this is a less desirable procedure.

(b) In the case of judicial partitions and sales, the substitute draft permits the action to be started by any one of the non-Indian owners. Inasmuch as the non-Indian may not initiate the administrative procedure through the Secretary, he will have no recourse unless he is allowed to go into court. This permission is qualified, however, by the requirement that the Secretary must first determine that a judicial sale will not affect adversely the interests of the Indians.

S. 1392 does not provide for judicial sales.

6. S. 1392 authorizes an increase in the appropriation for the Indian revolving loan fund from \$10 to \$50 million, and authorizes loans to be made to tribes for the purchase of heirship lands that may be offered for sale.

We have already recommended in our report on S. 1540 that the limitation on the appropriation authorization be removed entirely, and that the size of the fund be controlled by the usual budgetary and appropriation process.

We also feel that there is no need to spell out in the present bill the details governing loans for land acquisition. Our present authority is broad, and we have made land acquisition loans in the past. If Congress wishes to consider the desirability of limiting loans for that purpose, we recommend that the subject be handled separately as an amendment to the loan authority rather than as a part of this bill. The authority to sell unproductive heirship tracts to the tribe on a deferred payment plan, and the authority to partition or sell other heirship tracts should not be tied to a Federal loan fund to finance tribal acquisitions.

7. S. 1392 provides in section 9(a) for consolidating the general revolving loan fund and the two special accounts for the Oklahoma Indians and the Navajo-Hopi Indians and for some technical amendments to the language relating to

loans. We endorse this provision, but we have not included it in our substitute draft because it is extraneous to the main subject of heirship.

S. S. 1392 also contains in section 10 detailed provisions regarding administrative extensions of trust periods by general order, requiring trust periods to be extended only on the basis of individual determinations of incompetency, and providing for the inheritance of undivided interests in a trust status only on the basis of individual determinations of incompetency.

These provisions are drastic. Their impact would be difficult to anticipate in detail, but they clearly would involve a major change in Federal Indian policy. We feel that much more study and consideration should be given to the subject before legislation is contemplated. We therefore strongly recommend that this subject not be included in the proposed legislation now under consideration with respect to heirship lands.

By way of conclusion, we wish to point out that the enactment of the substitute draft bill will not result in an overnight solution to the heirship problem. We believe, however, that it will permit a giant stride to be taken in that direction.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

JOHN A. CARVER, Jr.,
Assistant Secretary of the Interior.

A BILL To put to more productive use idle Indian lands now in multiple ownership status, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SECTION 1. DEFINITIONS.—As used in this Act, the following definitions shall govern:

- (a) "Secretary" shall mean the Secretary of the Interior.
- (b) "Fractionation" shall mean the results of the process by which the beneficial interest in Indian trust lands and restricted lands has been divided among numerous owners.
- (c) "Trust lands" shall mean any real property in which any interest is held by the United States in trust for the use and benefit of an Indian or Indian tribe.
- (d) "Restricted lands" shall mean any real property in which any interest is vested in an individual Indian or Indian tribe subject to a restriction against alienation without the approval of the Secretary.
- (e) "Indian tribe" or "tribe" shall include any recognized tribe, band, group, community, or pueblo of Indians.

SEC. 2. POLICY.—It is hereby declared to be the public policy of the United States that Indian trust lands and Indian restricted lands shall be used productively for support and advancement of the trust beneficiaries. The Congress finds that the historical system of allotments to individual tribal members constitutes an impediment to full productivity and effective management when fractionation of ownership interests has occurred through descent and distribution to multiple heirs. It is the purpose of this Act to promote the consolidation of such interests through acquisition and management by the tribes of the beneficial interests held by individual Indians. The Secretary of the Interior is authorized and directed to take such action and to devise such plans or programs under the provisions of this Act as will give effect to the policy expressed herein.

SEC. 3. CONSOLIDATION OF UNPRODUCTIVE TRACTS.—Whenever the Secretary determines that any trust or restricted lands located within the boundaries of an Indian reservation are idle or economically unproductive because of fractionation of ownership interests or because tracts are so small or so isolated that their economic use is impeded, he is authorized to sell and convey to the tribe occupying the reservation, with the consent of the tribe, the complete beneficial interest in such lands, including any unrestricted interests. Title acquired by such action shall be taken either in an unrestricted status, a restricted status, or a trust status, depending on the prevailing title status of other lands within the reservation. Restricted and trust lands shall not be subject to taxation or

alienation without the consent of the Secretary. Each such sale and conveyance shall be subject to the following terms and conditions:

(a) The consideration for the sale shall be the appraised fair market value as determined by the Secretary;

(b) The consideration may be paid in installments, under a plan approved by the Secretary, and the obligation to pay may be evidenced by interest bearing certificates of indebtedness issued to former owners of conveyed lands representing their proportionate shares of the appraised market value;

(c) Such certificates shall provide for their redemption on a preferred basis out of any income realized from such lands through cultivation, sale, or otherwise and may, in the discretion of the Secretary, require a minimum annual payment out of tribal income generally;

(d) Outstanding certificates shall not constitute an encumbrance upon such lands and the lands may be otherwise encumbered or mortgaged by the tribe upon approval of the Secretary. For the purpose of any foreclosure or sale proceeding pursuant to such encumbrance or mortgage, the tribe shall be regarded as vested with an unrestricted fee simple title to the lands, the United States shall not be a necessary party to the proceeding, and any conveyance of the lands pursuant to the proceeding shall divest the United States of title to the lands.

SEC. 4. CONSERVATION OF ASSETS.—Whenever the Secretary determines that fractionation of ownership interests is preventing the effective use of any trust or restricted lands for which he would otherwise be authorized by law to execute or approve a contract or lease for the trust or unrestricted interests, he is hereby authorized, in his discretion and without the request or consent of owners, (a) to execute a lease for the use of such lands, (b) to execute a contract for the sale of any of the timber on such lands, or (c) to grant a right-of-way or easement over such lands, such action to be binding upon the owners of both restricted and unrestricted interests.

SEC. 5. ADMINISTRATIVE PARTITION OF TRUST OR RESTRICTED LANDS.—Whenever requested by individual Indians or an Indian tribe holding the majority interest in trust or restricted lands, the Secretary may, in his discretion, order the partition of the complete beneficial interest in such lands in kind or, if partition in kind is not practicable, order the sale of the complete interest in such lands, including any unrestricted interests, at not less than the appraised fair market value. For the purpose of this section the Secretary may represent the interests of any person who is a minor, who is non compos mentis, or who after reasonable notice cannot be located. Any partition or sale shall be subject to the following conditions:

(a) The Secretary shall have determined that such action is in the best interest of the Indian owners and not detrimental to the local Indian community;

(b) A sale shall be on the basis of competitive bids, except that prior to a competitive sale the tribe shall have a preferred right to purchase at the appraised value any lands offered for sale that are located within the boundaries of or immediately adjacent to its reservation;

(c) Title acquired by a tribe pursuant to this section shall be taken in the form prescribed by section 3. Title acquired by an Indian who is determined by the Secretary to need assistance in handling his affairs, or by an Indian who already owns a trust or restricted interest in such lands, may be taken in the name of the United States in trust for such Indian, or in the name of the Indian subject to a restriction against alienation without the approval of the Secretary. Such lands shall not be taxable;

(d) The proceeds of any sale shall be distributed to the owners under the terms and conditions of any law otherwise applicable to such distribution.

SEC. 6. JUDICIAL PARTITION. The owner of an undivided and unrestricted interest in trust or restricted lands may petition the Secretary to consent to partition of such lands. The Secretary shall grant such consent if in his judgment such action will not adversely affect any Indian owner of a trust or restricted interest or be detrimental to the local Indian community. In such event, any State court of competent jurisdiction may hear and render judgment for partition in kind or judicial sale of such lands in accordance with the law of the State wherein the lands are situated. For the purpose of any such action the Indian owners shall be regarded as vested with an unrestricted fee simple title to the lands, the United States shall not be a necessary party to the proceeding, and

any partition or conveyance of the lands pursuant to the proceeding shall divest the United States of title to the lands, terminate the Federal trust, and terminate all restrictions against alienation or taxation of the lands imposed by the United States: *Provided*, That any title acquired in the proceedings by an Indian or Indian tribe may with the consent of the Secretary be taken in a trust or restricted status under the circumstances stated in section 5(c).

SEC. 7. NOTICE. The Secretary shall give actual or constructive notice of any action proposed to be taken under sections 3, 4, and 5 of this Act, and shall provide an opportunity for any party in interest to submit written or oral objection to the proposed action.

SEC. 8. EXECUTION OF TITLE DOCUMENTS. The Secretary is authorized to execute such patents, deeds, assignments, releases, certificates, orders, leases, contracts, or other instruments as may be necessary or appropriate to carry out the purposes of this Act.

SEC. 9. REGULATIONS. The Secretary is authorized to issue such regulations as are necessary to carry out the purposes of this Act.

SEC. 10. This Act shall not repeal any authority of the Secretary under other law, but it shall supersede any limitation on the authority of the Secretary that is inconsistent with this Act.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., August 9, 1961.

Hon. CLINTON P. ANDERSON,
*Chairman, Committee on Interior and Insular Affairs, U.S. Senate, New Senate
Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Bureau of the Budget on S. 1392, a bill relating to the Indian heirship land problem.

The purpose of the bill is to authorize and direct the Secretary of the Interior to partition or sell the undivided Indian interest in any tract of trust or restricted Indian land upon the request of an Indian owner, unless the Secretary finds that such sale would not be in the best interests of the Indian owners. The bill further provides that such sales would be on the basis of competitive bids except that an owner or the tribe may purchase at the appraised value if no owner objects.

In order to assist tribes to purchase heirship lands, S. 1392 would authorize Federal loans to tribes for this purpose and would increase the authorization of appropriations to the revolving fund for loans from \$10 million to \$50 million.

The bill further provides that the trust or restricted status of Indian land shall cease when title passes by inheritance or devise unless the Secretary determines that the prospective owner is unable to manage his own affairs prudently. Also, general extensions of trust periods after January 1, 1964, would be prohibited; extensions would be permitted for individual Indians only on the basis of specific determination as to competency.

The Department of the Interior, in its report to your committee on S. 1392, has recommended enactment of a substitute draft bill which represents a considerably different approach to the problem. In brief, the proposed substitute would authorize the sale of heirship lands that are not in productive use to the tribe occupying the reservation without the consent of the owners. The sale would be at the appraised fair market value and payment for the land could be made in installments. The former owners could be issued certificates of indebtedness. Other heirship lands could be disposed of by the Secretary on a similar basis or by competitive bid upon request of the owners of a majority interest.

The substitute further provides that the Secretary may, under certain conditions, lease, sell timber from, or grant rights-of-way over heirship lands without consent of the owners.

In addition, the proposed substitute would authorize the partition of heirship lands upon petition by an owner of an undivided and unrestricted interest if, in the judgment of the Secretary, such action would not adversely affect any Indian owner of a trust or restricted interest or be detrimental to the local Indian community. The partition action would be carried out by any State court of competent jurisdiction.

We are enclosing for the information of your committee the views of the Department of Justice on the Interior-proposed substitute. These views raise serious questions about the portions of the draft bill which deal with the compensation of individuals whose interests in heirship lands would be sold.

If these questions are resolved to the satisfaction of the committee, the Bureau of the Budget would not object to enactment of the proposed substitute bill.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 8, 1961.

HON. DAVID E. BELL,
Director, Bureau of the Budget,
Washington, D.C.

DEAR MR. BELL: This is in response to your request for the views of the Department of Justice on a proposed report of the Department of the Interior on the bill (S. 1392) relating to the Indian heirship land problem.

The four paragraphs in the material numbered "2" on pages 1 and 2 of the draft report summarize the Indian heirship land problem arising under the statutes governing the descent and distribution of Indian allotted lands (25 U.S.C. secs. 372 and 373 (1958)), and some of the provisions of the proposed substitute draft bill. As far as is here material, section 3 of the substitute bill would authorize the Secretary of the Interior to convey to the Indian tribe occupying a reservation, with its consent, the complete beneficial interest in an Indian trust or restricted allotment in that reservation which is in heirship status and in which there is fractionation among multiple owners of the beneficial interest therein, without the consent of such owners, in consideration of the payment to each of them of his respective proportionate share of the appraised fair market value of such interest. As set forth in the draft report, the substitute bill would provide that such payment may be made in installments, and that the obligation to pay may be evidenced by interest-bearing certificates of indebtedness issued to a former individual Indian owner, representing his proportionate share of such value.

While the draft report would indicate that the holder of a certificate is assured of some minimum annual payment, either from income from the land or out of tribal income generally, it should be noted that under the redemption provisions in section 3(c) of the substitute bill, any such minimum annual payment from tribal income generally is entirely a matter in the discretion of the Secretary. Moreover, the draft report does not refer to section 3(d) of the substitute bill, expressly providing that outstanding certificates shall not be an encumbrance on such land, and that such land may be otherwise encumbered or mortgaged by the tribe with the approval of the Secretary. In short, the immediate holder of such a certificate would receive it as the result of a transaction which would constitute not only an involuntary, but also an unsecured, loan by him to finance for the benefit of the tribe the purchase on an installment plan of his beneficial interest in an allotment in heirship status.

The draft bill does not make it clear whether the Secretary, the tribe, or either, may issue a certificate. In either event, in view of the limitations in section 3(c) of the substitute bill as to the source of funds to redeem a certificate, it would seem that a certificate would not be an express or implied contract with the United States on which the certificate holder, in the event of default, could recover payment from the United States under the Tucker Act (62 Stat. 940, 28 U.S.C. sec. 1491 (1958)). Since any claim against the United States would be that of the individual holder, as distinguished from an Indian tribe, it would not be cognizable as an Indian claim against the United States within the provisions of title 28, United States Code, section 1505 (1958). In the event of default, a holder would have no recourse against the United States.

The general rule set forth in the *Federal Indian Law* (U.S. Interior Department, 725 (1958)), and in *Handbook of Federal Indian Law* (U.S. Interior Department, 339 (1942)), is that tribal funds held by the United States are not subject to the claims of third parties unless payment thereof is clearly authorized by statute or treaty, or by lawful action of the tribe itself. Under the

substitute bill, in the event of default, the holder of a certificate would have no assured recourse to tribal funds held by the United States. The certificate would, therefore, have little, if any, merchantability.

It is true that the United States, as guardian of Indian tribes and individual Indians and as trustee of their trust or restricted property, possesses a plenary power to manage Indian affairs which is not to be confused with its power of eminent domain. Under its power to manage Indian affairs, it may, without making compensation, do many things affecting Indian property. Under that power it may lease tribal lands and apply the rentals for the benefit of the tribe. (See *Cherokee Nation v. Hitchcock*, 187, U.S. 294 (1902).)

This power is, however, subject to the Constitution. *Stephens v. Cherokee Nation* 174 U.S. 445, 478 (1899)). In addition, the Supreme Court has held that the private property rights of an Indian are constitutionally secured and enforced to the same extent and in the same way as those of other residents and citizens of the United States, although the Indian may be subject to the guardianship of the United States as to his personal status. *Choate v. Trapp* (224 U.S. 665, 677 (1912)), and cases cited there.

If the substitute bill is predicated on the theory that a conveyance by the Secretary to the tribe is an exercise of the power of eminent domain of the Federal Government to condemn interests in private property for public use and that condemnation for the benefit of an Indian tribe constitutes a public use, it should be noted that the guaranty of just compensation in the fifth amendment to the Constitution for property taken for public use entitles the owner to certain and adequate provision for obtaining compensation before his occupancy is disturbed. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 611, 659 (1890). This guaranty does not mean receiving annual stipends, but means that owners are entitled to compensation; not that their heirs or estates are to receive installment payments. *United States v. 9.94 Acres of Land in City of Charleston*, 51 F. Supp. 478 (D.C.S.C. 1943). The substitute bill fails to make certain and adequate provision for obtaining compensation, and it specifically provides for installment payments. In both respects, it fails to meet the constitutional guaranty of just compensation under the fifth amendment for property taken for public use.

If, on the other hand, the substitute bill is predicated on the theory that under the plenary power of the Federal Government to manage Indian affairs, Congress may enact legislation authorizing the Secretary to convey to an Indian tribe the entire beneficial interest in an allotment in heirship status on which there is a fractionation of that interest among multiple owners, the provisions of the substitute bill, denying an Indian immediate and full payment for his interest in privately owned Indian property, fail to meet the standard prescribed by the Supreme Court respecting the protection of such private property rights.

Also, it is noted that section 4 of the proposal would extend the Secretary's authority to sell fractionated interests in or small tracts of trust or restricted lands upon his determination that they are idle or economically unproductive, or to lease such interests or to contract to sell the timber thereon "without the consent of the owners." The interests mentioned are vested, and doubts arise as to the constitutionality of such disposal. The retention of ownership of the interests by tribes purchasing them would not appear to dissipate such doubt. The provisions of section 7 that the Secretary shall give actual or constructive notice of such disposal, and shall provide opportunity to any party in interest to submit written or oral objection, may meet requirements as to due process, but do not supersede the requirement of judicial determination of just compensation in exercise of the power of eminent domain. As mentioned above, the private property rights of an Indian are constitutionally secured to the same extent as those of other citizens, although he may be subject to the guardianship of the United States as to his personal status. *Choate v. Trapp*, 224 U.S. 665, 677. As stated by Mr. Justice Van Devanted in *Chippewa Indians v. United States*, 301 U.S. 358 (1937);

"Our decisions, while recognizing that the Government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the Government to give the lands of one tribe or band to another, or to deal with them as its own." *Id.*, 375-376.

INDIAN HEIRSHIP LAND PROBLEM

Subject to the foregoing conclusions, the Department of Justice would have no objection to the proposed report of the Department of the Interior.

Sincerely yours,

BYRON R. WHITE, *Deputy Attorney General.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 9, 1961.

Hon. CLINTON P. ANDERSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1392) relating to the Indian heirship land problem.

This bill is a measure proposed to aid in a solution of the problem of the administration of Indian trust or restricted allotments resulting from the fractionation among multiple owners of the beneficial interest therein under the statutes governing the descent and distribution of such allotments (36 Stat. 855, as amended, 25 U.S.C. sections 372 and 373 (1959)).

The bill would authorize and direct the Secretary of the Interior, upon the request of any such owner, to partition or sell the undivided interest therein, unless the Secretary finds that such partition or sale would not be in the best interests of the Indian owners and so reports to Congress. The bill also specifies that such sales shall be at a price not less than one substantially equal to the appraised value, and that the proceeds shall be distributed under the individual Indian money regulations (25 CFR, pt. 104 (supp. 1960)). The bill would also authorize interest-bearing loans by the Federal Government to an Indian tribe which wants to purchase such interests and which has a plan for their use that the Secretary has approved. As security for the loan the tribe would be required to give the United States a mortgage on land so purchased and on such other tribal property as the Secretary deems necessary to secure the loan adequately.

As guardian of the Indian tribal and individual Indian wards of the Nation and as trustee of their trust or restricted property, the United States has plenary power to manage Indian affairs. (Cf. *Thomas v. Gay*, 169 U.S. 264 (1898); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). While the power is subject to the Constitution *Stephens v. Cherokee Nation* (174 U.S. 445 (1899)), the provisions of the bill for prompt payment in full for the account of the Indian owners of a price not less than substantially the fair market value of Indian heirship land which may be sold under the bill appear to be constitutionally adequate. (Cf. *Choate v. Trapp*, 224 U.S. 665 (1912)) cf. also 33 Op. Atty. Gen. 25 (1921), 59 Interior Dec. 100 (1945)).

The subject of this legislation is not a matter for which the Department of Justice has primary responsibility, and accordingly we make no recommendation as to the enactment of the bill. However there are certain features of the proposal to which attention is invited.

Since it is only by implication that the bill would authorize the Secretary to issue rules and regulations respecting the subject matter of the bill the committee may wish to consider whether specific authority in this connection should be provided.

Section 10 of the bill would make a number of provisions to prevent as far as possible an increase in the heirship land problem. Section 10(b) would provide that title to an interest in heirship land shall pass by operation of law in a nontrust or unrestricted status unless the Secretary of the Interior determines before the close of an Indian probate proceeding that the Indian heir or devisee is not competent to manage his own business affairs with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing his property or the benefits thereof, the standard prescribed in *United States v. Debell*, 227 Fed. 760, 770 (8th Cir. 1915). Section 10(c) would impose a like requirement on other acquisition by an Indian of title to land or an interest therein in a trust or restricted status, i.e., land which may later pass into Indian heirship status.

If the Secretary terminates the trust status or restrictions on alienation of title to Indian land or an Indian interest therein, under section 10(g) of the bill the Indian may apply to the appropriate U.S. district court for an order setting aside the Secretary's action, and the court shall have jurisdiction to issue such order, if, in its judgment, the Indian lacks the prescribed capacity to manage his own business affairs. Any such action by the Secretary will normally make the lands subject to State and local real property taxation, cf. 24 Stat. 390, as amended, 25 U.S.C. 349 (1958), it seems probable that many of the Indians whom the Secretary might find competent under section 10 (b) and (c) to manage their respective business affairs would file an application with the appropriate district court to have the Secretary's order of competency or order removing restrictions set aside. If so, this provision will increase the judicial backlog of civil suits in those district courts in which such Indian lands may be located. For the most recently available statistics on that backlog, see table C1 in the material following page 12 in the quarterly report of the Director of the Administrative Office of the U.S. Courts for the Third Quarter of Fiscal Year 1961 (Jan. 1-Mar. 31, 1961).

In addition section 10(g) would provide for judicial review of the question of the competency of an individual Indian, a matter which has historically been under the exclusive jurisdiction of the Secretary of the Interior. In view of the prospect that section 10(g) would increase the existing backlog of civil suits in the district courts in which there are Indian lands, and in view of the historic practice of leaving to the Secretary exclusive jurisdiction over determinations as to the competency of an individual Indian attention is invited to the questions of policy that section 10(g) would raise.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

BYRON R. WHITE, *Deputy Attorney General.*

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, April 27, 1961.

B-145427

HON. CLINTON P. ANDERSON,
*Chairman, Committee on Interior and Insular Affairs,
U.S. Senate.*

DEAR MR. CHAIRMAN: By letter dated March 23, 1961, acknowledged March 24, you requested our comments on S. 1392 which relates to the Indian heirship land problem.

Our office has consistently emphasized the need for legislation to resolve this problem. In our report to the Congress, B-114868, March 21, 1961, on the review of certain aspects of the program for the termination of Federal supervision over Indian affairs, we pointed out that this need continues to exist and recommended that the Congress enact appropriate legislation.

Because of the continuous subdivision of ownership of Indian trust and restricted lands due to deaths of the allottees and transfers of undivided interests in the lands of heirs and devisees, the lands have passed into multiple ownership which increases the cost of the Bureau's land management activities and creates a serious obstacle in subsequent use and disposal of the lands. Without remedial legislation, the heirship land problem will become increasingly complex with the further subdivision of the undivided interests of present and future heirs and devisees when they die. We believe that S. 1392 will alleviate the Indian heirship land problem.

This measure would lighten the Indian heirship problem by giving the Secretary of the Interior additional authority to partition or to sell Indian lands. In order to permit retention of the land in Indian ownership, S. 1392 would give to any one of the owners of an interest in the land and to the tribe within whose reservation the land is located the right to acquire the land at not less than the appraised value.

To prevent continuation of the problems of multiple ownership of Indian trust and restricted lands consistent with the need to protect the proprietary

interests of certain Indians, S. 1392 would, in any case of transfer of title to Indian trust or restricted land or interest therein by inheritance or devise, by operation of law pass title in a nontrust and unrestricted status unless the Secretary of the Interior determines before the close of the probate proceedings that the Indian heir or devisee concerned cannot manage his business affairs with such reasonable degree of prudence and wisdom as will prevent him from losing his property or the benefits thereof.

There are certain particulars concerning S. 1392 upon which we would like to make specific comment.

"Section 1 provides "that upon the request of any owner * * *, the Secretary of the Interior is authorized and directed to partition or to sell all undivided Indian trust or restricted interests in the land * * *." Sale of trust or restricted interests may depend upon sale of the entire allotment of land. In such event, if there are also non-Indian or unrestricted interests in the tract of land to be sold, the Secretary will be unable to sell the land unless he can obtain from all owners concerned the power of attorney authorized by section 2 of S. 1392. There is lacking in this bill a course of action for the Secretary to take in the event a sale cannot be consummated because an owner of a non-Indian or unrestricted interest cannot be located or refuses to grant the Secretary a power of attorney. We feel that S. 1392 should provide the Secretary with other recourses in such cases, such as appropriate court action.

Section 3 authorizes the Secretary to represent Indian owners who are non compos mentis, minors or cannot be located. In keeping with our previous comments, we believe that this authority should also include Indian owners of non-restricted interests and that the Secretary should be further authorized to obtain permission from a court of competent jurisdiction to represent non-Indian owners who cannot be located.

Section 4 prescribes the technique of sale and gives special preference to owners of an interest in the land and to tribes in the purchase of heirship lands. This purchase preference may be exercised at prices not less than the appraised value of the land. The bill does not specify who is to appraise the land to determine its value. The Congress may deem it desirable to authorize the Secretary to have these appraisals made and to charge the cost thereof to the owners.

Section 4 also provides that no sale shall be made unless the price is substantially equal to the appraised value. This restriction is apparently intended to protect the interests of the owners. It could, however, serve to defeat the proposed sale if the appraised value was for any reason unrealistically high. Moreover, clarification of the limiting words "substantially equal" appears desirable since they are subject to varying interpretations which may result in inconsistent applications. To adequately protect the landowners' interests and facilitate attainment of the bill's objectives, we believe that this section should include a proviso to the effect that when the highest bid received is less than 75 percent of the appraised value of the land to be sold, the Secretary shall reappraise the land after which he shall, if desirable, reject all bids, solicit new bids, and sell the land to the highest bidder but at not less than 75 percent of the reappraised value. Either the original appraisal or the reappraisal should be made by an independent appraiser.

Section 9(a) provides that "All funds that are * * * a part of the revolving fund authorized by the Act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1968), and the Act of April 19, 1950 (64 Stat. 44) * * * including sums received in settlement of debts of livestock pursuant to the Act of May 24, 1950 (64 Stat. 190) * * * shall hereafter be available for loans to organizations of Indians * * * and to individual Indians * * * for any purpose that will promote the economic development of such organizations and their members, or the individual Indian borrowers." This language will permit the loan funds authorized by the cited acts to be used to make loans to organizations of Indians or to individual Indians without regard to the limitations contained in the above acts on the amounts authorized for loans to particular Indians.

As stated, we feel that S. 1392 will alleviate the Indian heirship land problem. We therefore urge its enactment by the Congress.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1961.

Hon. CLINTON P. ANDERSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate.

DEAR MR. CHAIRMAN: By letter dated July 12, 1961, acknowledged July 14, you requested our comments on a legislative proposal submitted to you by the Department of the Interior which, according to its title, is designed to put to more productive use idle Indian lands now in multiple ownership status. A measure identical to the submitted proposal has been introduced in the House of Representatives under the designation, H.R. 8077, 87th Congress.

The Department's proposal was submitted to be used in lieu of S. 1392, a bill relating to the Indian heirship land problem. In our report to you of April 27, 1961, we expressed the opinion that S. 1392 would alleviate the Indian heirship land problem and urged its enactment by the Congress.

We believe that the Department's proposed legislation does not adequately cope with the Indian heirship problem. Staffs of the Senate and House Committees on Interior and Insular Affairs concluded extensive studies in December 1960 of the Indian heirship land problems. These studies indicate that the Federal Government holds title in trust for about 12.2 million acres of individual Indian land, of which about 6.2 million acres is now in heirship status and the remainder of which will pass into this status upon the death of the original allottees. Under the Department's proposal, no provision is made to stop any portion of the estimated 6 million acres of land now being held in trust for the original allottees from becoming involved in the Indian heirship problem or to attempt to halt with respect to competent Indians the further fractionation of the 6.2 million acres of land now in heirship status. Section 10 of S. 1392 provides that in any case of transfer of title to Indian trust or restricted land or an interest therein by inheritance or devise, the title shall pass by operation of law into a nontrust or unrestricted status unless the Secretary of the Interior determines the Indian heir or devisee to be incompetent of managing his business affairs.

The Department's proposed bill is silent with respect to the treatment of mineral interests in a partition or sale of heirship lands. Transfer of title to only the surface rights to a tribe or other purchaser will increase the heirship land problem if mineral rights are permitted to be retained in a trust status by the tenants in common of the heirship land being sold.

Our comments with respect to specific sections of the Department's proposed bill follow.

Section 3 does not provide for equitable treatment of the rights of the individual owners and appears to be unnecessary in view of other provisions of the proposal. Under this section the Secretary, with the tribe's consent but without the consent of the owners of the land, is authorized to convey unproductive allotted lands to Indian tribes. No guides or restrictions are provided for the Secretary in making his determination that lands are idle or economically unproductive. A tract of land that is not economically productive for several owners may well be economically productive for one owner. However, this bill would permit a tribe to acquire land without giving one of the owners in common the right to purchase the beneficial interests of the other owners. Under S. 1392, the owners in common are given a preferential right to buy the land. In a letter dated June 5, 1959, to the chairman, Senate Committee on Interior and Insular Affairs, the Department, in commenting on S. 51, 86th Congress, recognized the land rights of the individual Indian as preferential to the rights of the tribe. We believe that if a tribe wants allotted lands that are not in heirship status it should negotiate with the owner rather than to have the land conveyed to the tribe by the Secretary at an appraised price without cash settlement and without the consent of the individual owner. If a tribe wants allotted lands that are in heirship status, it can acquire these lands under section 5 of this bill. It is our view that the Department would be authorized under section 4 of this bill to put to use lands that are unproductive because of the heirship problem.

Sections 3 and 5 of the Department's bill contain provisions which we believe are inconsistent with the trust relationship. In both of these sections the Department gives the tribes a preferential right over the tenants in common to buy heirship lands at the appraised fair market value as determined by the Secretary. This is a major change from the position taken by the Department in its letter dated June 5, 1959, to the chairman, Senate Committee on Interior and

Insular Affairs, in commenting on S. 51, 86th Congress, in which it proposed that each of the tenants in common should be given a preferential right to the land that is to be sold, and if none of the tenants in common wants to buy the land, the tribe should be given a right to buy the land either by negotiation at the appraised value, or by meeting the highest competitive bid, or by participating in an auction. We feel that the tenants in common, by virtue of their interest in the land to be sold, should have a preferential right to buy the land. A denial of such right by the Secretary by a sale of the land at less than the highest possible price would constitute a failure to carry out the Department's trust responsibilities in the best interests of the individual trust beneficiaries.

Section 3 and subsection 5(c) provide that title acquired by a tribe to trust or restricted lands shall be taken either in an unrestricted status, a restricted status, or a trust status, depending on the prevailing title status of other lands within the reservation. The need for this provision is not apparent. It would seem that if the title to other tribal lands is held in trust or restricted status, then title to conveyed trust or restricted lands should be held in the same status. The bill should be clarified to show the purpose of authorizing the Secretary to permit tribes to take title in an unrestricted status and whether this action would permit the tribes to sell such lands without the approval of the Congress as is now required. In addition, this provision does not prescribe the basis for determining the prevailing title status of other lands within the reservation. Because this status could be determined on more than one basis, such as the number of acres or the number of titles, we believe that the basis should be specified.

Subsection 3(a) establishes the sales price for section 3 sales as the appraised fair market value as determined by the Secretary. Under this provision the owners would not necessarily receive the highest possible price for their lands. We believe that land should be sold for an appraised value only if none of the owners, after reasonable notice, objects. Moreover, as trustee of the lands, the Bureau of Indian Affairs should obtain the highest possible price for the lands in meeting its trust responsibilities to the individual owners.

Subsection 3(b) would permit the tribes to take the land without immediate settlement, whereas, sales to others and sales under S. 1392 would give the sellers all of the sale price at the time of the sale and would remove the heirship problem. If the consideration is paid in installments and evidenced by interest-bearing certificates, the heirship problem remains and becomes worse during the certificate payout period. The use of certificates and the liquidation of the indebtedness by installments will result in increased bookkeeping. Because the former owners and the tribes are under the trust supervision of the Bureau, it can be assumed that the Bureau will do this bookkeeping just as it does the bookkeeping for individual Indian money accounts and for tribal funds on deposit in the Treasury. Unless some provision is made for the recovery of the cost of this service, the Government will have to pay through annual appropriations the increased costs caused by this additional bookkeeping.

Subsection 3(b) provides for certificates to be issued to evidence the indebtedness of the tribe but does not specify whether the certificates will be negotiable or nonnegotiable. We believe that the bill should specify whether the certificates shall be negotiable or nonnegotiable. If the certificates are to be negotiable, safeguards should be provided to protect the interest of incompetent Indians.

Subsection 3(b) provides that the certificates be interest bearing but it does not prescribe the rate of interest to be paid or a method for establishing the rate of interest. We believe that the bill should specify the rate or method of determining the rate of interest to be paid on these certificates.

Subsection 3(c) provides for redemption of certificates on a preferred basis out of any income realized from conveyed lands through cultivation, sale, or otherwise. We are aware of no general authority available to tribes to sell land and no such authority is specifically stated in this bill. If the intent is to give the tribes such authority, we believe that this authority should be specifically stated rather than implied from the wording of this subsection or the wording in the first paragraph of this section which would permit the tribe to take title in an unrestricted status under certain conditions.

Subsection 3(d) provides that outstanding certificates shall not constitute an encumbrance upon the lands conveyed and the lands may be otherwise encumbered or mortgaged by the tribe. The operation of this subsection would leave the former owners holding unsecured notes for land conveyed to the tribe. In such case we believe that the rights of the certificate owners would not be adequately protected.

The language " * * * For the purpose of any foreclosure or sale proceedings pursuant to such encumbrance or mortgage * * *" as used in subsection 3(d) needs, in our opinion, some clarification. Do the words "or sale proceedings pursuant to such encumbrance or mortgage" anticipate that there might be sales other than one made upon foreclosure? If those words do not mean to provide for such additional authority, then they are redundant. If those words do mean to provide for such additional sales, then the additional sales apparently would depend upon terms of the encumbrances or mortgage apart from the foreclosure terms. In such case we feel that some indication as to the type of terms which will provide for the additional sales should be written into the proposed bill.

Section 5 provides that when requested by the holders of a majority Indian interest in trust or restricted lands, the Secretary may, in his discretion, order the partition or sale of the complete interest in such lands, at not less than the appraised fair market value, subject to certain conditions set forth in the subsections. Although under this provision the owners of the majority interest must agree to the sale or partition, this provision is not mandatory on the Secretary, it disregards any non-Indian interest in the land, and it does not grant to an Indian the right enjoyed by non-Indian owners of non-Indian lands to force a partition or sale of land held in joint ownership. In contrast with this bill, S. 1392 gives the Indians this right without the impediment of court costs by authorizing and directing the Secretary upon the request of any owner of an Indian interest in trust or restricted land to partition or to sell all undivided interests in the land.

Section 5 provides for land to be sold at not less than its appraised fair market value. This section does not specify who is to appraise the land to determine its value. The Congress may deem it advisable to authorize the Secretary to have these appraisals made by independent appraisers and to charge the cost thereof to the owners.

Subsection 5(a) requires the Secretary to determine that a partition or sale is in the best interest of the Indian owners and not detrimental to the local Indian community. We see no basis in the Department's trustee relationship which would permit the interest of the community to take precedence over the interest of the individual owners. Also, S. 1392 requires the Secretary to report annually to the Congress if he determines that a partition or sale would not be in the best interests of the Indian owners. The Department's bill does not have this desirable requirement.

Subsection 5(b) again subordinates the interests of the owners of the land to the interests of the tribe by giving the tribe a preferred right to buy the land at the appraised value rather than at the highest bid price received in an advertised competitive sale of the land. In a similar provision, S. 1392 gives any one of the owners the right to object to a sale to the tribe at the appraised value and requires that the land be sold by sealed, competitive bids, and under certain conditions be subject to an auction in which event the tribe must bid the highest price to acquire the land.

Section 6 provides for judicial partition, with the consent of the Secretary, if requested by any owner of an undivided unrestricted interest in trust or restricted lands. S. 1392 provides for partition or sale at the request of any Indian owner with an interest in trust or restricted lands but makes no provision for partition or sale at the request of any non-Indian owner. We believe that any final legislation on this matter should provide for the Secretary to partition or sell trust or restricted lands on the request of any owner with an interest in trust or restricted lands, regardless of whether the owner is Indian or non-Indian.

In summary, we feel that the proposal submitted by the Department of the Interior should not receive favorable consideration for two reasons. Specifically, we do not feel that the proposal adequately deals with the Indian heirship land problem and, as drafted, we feel that the proposal does not meet the requirements of the Department's trust responsibility to the individual Indians.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

Senator CHURCH. The excerpt from the Congressional Record, containing my remarks when I announced that hearings would be held on the bill, and the press release that ensued, will be placed in the record at this point.

(The exhibits are as follows:)

[From the Congressional Record, Senate, July 18, 1961]

ANNOUNCEMENT OF HEARINGS ON S. 1392, RELATING TO THE INDIAN HEIRSHIP LAND PROBLEM

Mr. CHURCH. Madam President, I announce for the information of the Senate that beginning on Wednesday, August 9, at 10 a.m., in room 3110, New Senate Office Building, the Indian Affairs Subcommittee will hold hearings on S. 1392, a bill relating to the Indian heirship land problem.

The Department of the Interior has submitted its report on S. 1392, which is in the nature of a substitute, and it is my intention, as chairman of the subcommittee, to consider both bills at that time.

I hope that all interested parties who may wish to appear before the committee or submit statements in connection with the proposed legislation will contact the staff of the Committee on Interior and Insular Affairs so that an appropriate witness list may be prepared.

[For immediate release from the office of Senator Church]

WASHINGTON, July 18.—The Senate Subcommittee on Indian Affairs will begin hearings August 9 on legislation proposed to solve the Indian heirship problem, Chairman Frank Church (Democrat, Idaho) announced today.

Church said the Interior Department has recommended changes in S. 1392, a bill he introduced at this session which would attempt to untangle snarled ownership of allotted Indian lands.

"The subcommittee considers the heirship problem one of the major obstacles to Indian economic and social progress," Church said. "We intend to provide Indians, Interior Department officials, and other interested persons every opportunity to appear and testify on the proposed legislation."

Church said S. 1392 had been introduced following a 2-year study of the problem by both Senate and House committees, with the hope it would provide the basis for agreement on specific legislation.

He said anyone interested in testifying should write or inform the Senate Committee on Interior and Insular Affairs, 3108 Senate Office Building, Washington, D.C.

The hearings will start at 10 a.m., Wednesday, August 9, in room 3110 of the New Senate Office Building.

Senator CHURCH. I will place at this point in the record the pertinent portions of the memorandum which I, as chairman of the Indian Affairs Subcommittee, had prepared for the use of the full committee. It is dated May 1, 1961.

(The memorandum is as follows:)

INDIAN HEIRSHIP LAND SURVEY

Memorandum of the chairman of the Subcommittee on Indian Affairs to the members of the committee on Interior and Insular Affairs, U.S. Senate, May 1, 1961

For many years those of us directly involved in the legislative and administrative aspects of American Indian affairs have been aware of the so-called heirship land problem on many reservations. From time to time, individual tribes have come before the committee asking that something be done to alleviate the fractionated ownership of individual Indian allotted lands.

Two years ago Senator James E. Murray, of Montana, then chairman of the Committee on Interior and Insular Affairs, instructed Mr. James H. Gamble of the committee staff to engage the assistance of Dr. William H. Gilbert and Mr. Stephen A. Langone, consultants in Indian affairs of the Library of Congress, to undertake a study of the Indian heirship problem.

It was decided that a series of questionnaires should be sent out to the various central office and field officials of the Government and officials of the Indian tribes asking for information and opinions relating to the issue of heirship lands. The questions were directed to the Central Office of the Indian Bureau, the area

offices of the Indian Bureau, the agencies of the Indian Bureau, to the Solicitor's office of the Interior Department, to the field examiners of inheritance, and to the various tribal councils.

The returns from these questionnaires were compiled into a volume of materials which have been issued as part I of the "Indian Heirship Land Survey." In part II of the "Indian Heirship Land Survey" there is presented an analysis by the committee staff of the materials presented in part I, together with an index of the two parts. These reports have been recently made available as a result of 2 years of diligent labor on the part of the committee staff.

Simultaneously with the Senate committee study of heirship, the House committee has also been attacking the same subject but in a different way. Early in the 86th Congress the House Committee on Interior and Insular Affairs instructed Dr. J. L. Taylor of the committee staff to obtain the assistance of the Library of Congress consultants in Indian affairs, Mr. Stephen A. Langone and Dr. William H. Gilbert, to make a comprehensive study of the heirship problem and to prepare a thorough analysis of their findings.

In anticipation of the formulation of legislation on the subject, the House committee sought to determine the opinions of the Indian heirs who are directly concerned. It sought for answers to questions regarding individual experiences with heirships land, their particular problems with their land, what they think should be done about this matter and why. Since hearings would be physically impossible over so wide an area as the distribution of the heirs was extended, it was decided that all known heirs would be contacted by means of a questionnaire through the mail. House Committee Print No. 27, volumes I and II, issued December 31, 1960, contains the responses of the Indians to the questionnaire. It gives a complete picture of the range of opinions of Indian owners of heirship land.

The congressional committee staffs have compiled for us the most complete and up-to-date information on what the heirship problem is and where it exists. We now have adequate background material on which to frame a legislative solution to the multiple ownership of allotted land. Therefore, I instructed the staff to prepare a bill that would effectively and realistically aid in the alleviation of this long-standing and complex problem.

I wish to make it very clear that this proposal is a vehicle for the purpose of exploring further the viewpoints and wishes of the people most affected by this problem. Hearings on the bill should be held in the near future, and I am sure we will receive many valuable suggestions and recommendations which will aid us in our efforts to enact effective heirship legislation.

This proposal is quite different from others which have come before the Congress in recent years. It is the result of a prolonged and detailed investigation of the problem by the staffs of the Senate and House Committees on Interior and Insular Affairs. It was directed not only to the Government officials involved and the tribal officials but also to the Indians themselves, the owners of heirship land whose interests are most immediately involved in any legislative action on this subject.

There follows, for the information of committee members, a section-by-section analysis of the bill prepared by the staff.

SECTION-BY-SECTION ANALYSIS OF S. 1392

This particular bill is designed to provide an effective program to assist individual Indians and tribes in alleviating the heirship land problem and to prevent other lands from entering this status. It is difficult to arrive at the necessary balance needed between the indiscriminate disposal by Indians of their land as opposed to an effective solution to this problem. Such legislation must provide for partitionment of Indian interests if feasible, an opportunity for the heir to buy out other interests, an opportunity for the tribes to purchase the more important heirship tracts needed to strengthen their economy, and a realistic approach to the problem that will result in the more efficient and less costly administration of trust property. The legislation must also provide the Secretary of the Interior with sufficient authority to solve the problem and yet leave enough discretion on his part to protect the best interests of Indian owners in each case. This bill is based on thorough congressional studies of the problem through contact of Government officials directly concerned, the heirs themselves, and the tribes.

SECTION I

Provision is made for a single heir to bring about a partition or sale of an heirship tract. An examination of the various acts of Congress passed in recent years having to do with heirship land indicated that the most effective method in solving the heirship problem is that requiring only one heir to bring the action. The specific legislation referred to is the Tulalip (70 Stat. 290). That legislation would be even more effective if the Indians did not have to pay necessary court costs of such actions. This bill authorizes a single heir to bring an action without court costs to hamper him in these proceedings. The desire of the Indians themselves for such legislation is evident when we consider that 55 percent of the heirs answering a congressional questionnaire wanted all their heirship lands sold and another 13 percent wanted to sell some. One important point that was established in both congressional studies concerns the heirs living on heirship lands in which they own an interest. In many cases these individuals may not be financially able to move from the land should it be sold. Therefore, this bill provides that if partitionment is not feasible the Secretary may withhold approval of sales in cases where it would not be in the best interests of such Indian owners.

The bill is also tailored to meet the problem of mineral rights. Should an heir decide to sell the land and retain the mineral rights in trust, the heirship problem would continue. The Federal Government's responsibility for probating estates, posting interests, disbursing income, etc., would remain and the heirship problem with it. At the same time it is recognized that if the Indian does want to retain his mineral rights he should certainly have that opportunity. The studies of both the Senate and House Interior Committees have recognized this problem and section 1 of the bill was therefore drafted in such a way that this potential mineral heirship problem would not arise and yet the Indian is given the option of retaining the mineral interest.

One of the most important factors that must be kept in mind concerning this section is that it provides a device for the individual Indian and the tribe to sell scattered interests and buy one consolidated unit that he or they can use for either residential or commercial purposes.

SECTION II

The Secretary of the Interior is given the authority to sell a non-Indian interest (with power of attorney) in heirship lands. Both congressional studies have noted this problem since there are non-Indians, Mexican Indians, and Canadian Indians owning interests in heirship lands. A survey of their (alien Indians and non-Indian) opinion has been made and the majority want to sell their heirship interests and would therefore utilize this particular method. The Department itself in a report on H.R. 1150 (86th Cong.) recognized this problem also. This particular section of the bill is designed to provide the opportunity for these people to sell their land and this in turn would be beneficial to those American Indians holding interests in the same tract.

SECTION III

One of the greatest problems in the field of heirship land is that Indian owners are many times impossible to locate and as a result the land may lie fallow. Another problem is that the cost of guardianship for minors would in many cases exceed the income from the estate. Section 3 of this bill authorizes the Secretary of the Interior to represent the non compos mentis, minors, and heirs who cannot be located.

To illustrate how widespread this problem is, the House Interior Committee attempted to contact heirs to survey their opinions on the subject. Many of the names on the mailing lists of heirs supplied by the Bureau of Indian Affairs had notations stating that addresses were not known. Of the 52,000 with addresses to whom the questionnaire was mailed, over 10 percent could not be delivered.

SECTION IV

Special preference is given to heirs and the tribe in purchase of heirship lands offered for sale. Many heirs expressed a desire to sell their interests either to another heir or the tribe, and others expressed a desire to purchase the other interest. In addition to the Senate and House studies calling attention to this situation, it was recognized in a report of the Interior Department to

the Senate Interior Committee stating in part that "each of the tenants in common should be given a preferential right to buy the land that is to be sold and thus retain it in Indian ownership" and that "if none of the tenants in common wants to buy the land, the tribe should be given right to buy the land either by negotiation at the appraised value, or by meeting the high competitive bids, or by participating in an auction."

This bill, then, allows the individual or the tribe to purchase such lands with the consent of the other owners. There is need for a careful balance here between the preference rights of the purchaser and the right of the other heirs to a fair price for their interest. Therefore, the individual owners also have a right to object to this special preference if they feel it is not a fair price. The procedure for sealed bids and then an auction is a protective device for the heirs and the tribe, since some tribes do own interests in heirship tracts and they are given the right to protect such interests.

Any lands purchased by a tribe may be taken in trust if they are within reservation boundaries. Heirship lands purchased by a tribe or an heir that are outside of the reservation would not be taken in trust, except in the case of an individual Indian in need of continued supervision.

SECTION V

Long-term loans are authorized to assist tribes not having adequate funds of their own to purchase needed heirship lands and to consolidate present holdings into more economic areas. This section is intended to implement the opportunity for tribes who have expressed interest in doing so to purchase needed heirship lands and to provide the Secretary of the Interior with authority to see that such programs are economically feasible for the tribe concerned. Loans would be made from the revolving credit loan fund. In order to assure that any plan involving the use of loans has the support of the Indians, the bill provides that the plan must be agreed to by a majority of adult tribal members voting in a referendum. This process would assure that any plan presented to the Secretary of the Interior would have been thoroughly discussed by the tribal members and they in turn would have an adequate understanding of the program and would have had an opportunity to express their views.

SECTION VI

Tribes are authorized to sell any tribal land to further their land consolidation programs. This particular section (6) is intended to assist any tribe that adopts an approved plan to have more flexibility in consolidating its holdings and purchasing needed heirship lands. A typical land consolidation program might very well provide for the sale of inferior land or land that cannot be effectively utilized in order to purchase other more desirable heirship land.

SECTION VII

In an effort to avoid any programs that might tend to confuse any termination activities, no plan can be approved that will prevent or delay such actions.

SECTION VIII

All other authorities through which this problem can be solved or alleviated are not affected by this bill.

SECTION IX

All funds presently authorized for loans to Indians would be consolidated into one revolving fund. This is in keeping with a recommendation of the Senate Appropriations Committee. An additional \$40 million is authorized for loans, making a total of more than \$50 million in authorizations for this purpose and other requirements.

The intent of this section is to provide the Secretary of the Interior with authority to determine whether an individual Indian is capable of controlling his land and, if so, to give him a fee title to it. Many Indians have informed the Congress that they consider themselves fully capable of doing so. In the past there has been an extension of the trust period over land without any consideration given to whether the individual wants it or if continued trusteeship is needed. This has been one of the prime factors in compounding the heirship problem. There is, as brought out in both the Senate and House studies, a po-

tential of 6 million acres of land that will become heirship unless some action is taken, and as the Comptroller General stated in his report to the Congress: "All allotted lands will fall eventually into heirship status unless the land is removed from trust status before the death of the allottee."

The Comptroller further recommended that " * * * the Congress consider legislation which would—without prejudicing any existing exemption from taxation constituting a vested property right—authorize the Secretary of the Interior to issue patents in fee, certificates of competency, or orders removing restrictions, whichever is appropriate, to all Indians holding restricted lands who have been determined by the Secretary to be competent, without requiring the application or authorization of the Indian, where such authority is not granted under existing legislation." This section incorporates the findings of Senate, House, and Comptroller's studies on the subject by providing the Secretary with authority to take such actions and yet giving the Indian an opportunity to protect his interest.

SECTION XI

A period of delay is provided during which time the Secretary can notify the tribes and they can plan their programs. Provision is also made for notifying heirs of their rights under this legislation. This period can also be utilized by the Department to formulate necessary regulations, etc., to implement the program.

Senator CHURCH. Our first witness is John Carver, Assistant Secretary of the Interior.

Mr. Carver, we are pleased to welcome you. I understand you are accompanied by Martin P. Mangan, the Assistant Commissioner for Legislation, and Lewis Sigler who, of course, is well known to the committee.

Mr. CARVER. Thank you, Mr. Chairman.

Senator CHURCH. Mr. Secretary, I would like to ask before you start your testimony, since we will have many questions to put to you, whether Congressman Berry is in the room?

Mr. GAMBLE. He is attending a committee meeting in the House, Mr. Church, and will come over later.

Senator CHURCH. Fine. Why don't you proceed, with your statement Mr. Secretary, and we will get this hearing launched.

STATEMENT OF JOHN A. CARVER, JR., ASSISTANT SECRETARY OF THE INTERIOR; ACCOMPANIED BY MARTIN P. MANGAN, ASSISTANT COMMISSIONER FOR LEGISLATION; AND LEWIS SIGLER, ASSISTANT LEGISLATIVE COUNSEL

Mr. CARVER. Thank you, Mr. Chairman.

It is a pleasure for me to appear before you in support of legislation dealing with the Indian heirship problem. As all of this subcommittee is aware, the problem has been of major concern both to the Congress and to the Department for many years. I think it is apparent that the problem has steadily been growing more serious and that it is in danger of getting out of hand unless something is done about it.

I think the summary and analysis that you have given, Mr. Chairman, of the urgency of the problem is very well taken, and the Department would concur in it.

Your committee has undertaken a study of the problem and has accumulated a wealth of most useful information. The Department has also taken a long, hard look at the problem and is now ready to recommend action in the form of the substitute draft bill which we have sent along as an accompaniment to our report to your bill.

Our report on S. 1392 has been submitted to the committee. As I have said, it recommends the enactment of a substitute draft bill.

I should like to emphasize that the substitute draft is not intended to provide a quick or a complete solution to the problem. I don't believe it would be possible to agree on a bill of that scope. I do believe, however, that the Department's substitute draft will permit us to take a tremendous first step, and will permit us to take this first step in the area that most urgently needs attention.

Our draft has two major premises. First, the heirship land should be put to a more productive use, and, second, the heirship land should be kept in Indian ownership to the maximum extent possible.

With these two provisions in mind, our draft starts with the heirship lands that are now idle or economically unproductive. One of our first efforts should be to get them into a productive use in order that the Indian owners will receive some benefit from them.

Our bill authorizes the Secretary to return these lands to tribal ownership by selling them to the tribe on a deferred purchase plan. The tribe will agree to pay the fair market value out of income from the land, with interest on unpaid balances, and the Secretary may require the tribe to agree to take a minimum annual payment out of general tribal income.

The advantage of this procedure is that the tribe can consolidate the land into economic units and the Indian owners will begin to receive an income from land that has been yielding nothing. The heirship cycle will be stopped because the title to the land will be in the tribe. The deferred purchase price will be evidenced by certificates issued to each owner, and the tribe will retire these certificates in much the same way that a corporation would redeem corporate debentures.

The amount of heirship land in unproductive status is only a part of the problem. Much of the heirship land is in some form of use. With respect to that land, our draft bill provides for an administrative partition in kind or sale upon the application of Indians who own a majority interest, and the Secretary is authorized to speak for the purpose on behalf of minors, Indians who are non compos mentis, and Indians who cannot be located.

The administrative partition or sale, however, is subject to two important safeguards. The first is that the Secretary must be convinced that the action will be in the best interests of the Indian owners, and that it will not be detrimental to the Indian community. The second is that the tribe will have a preferred right to purchase the land at its appraised value.

This raises the question of financing tribal purchases. We suggest that adequate authority already exists under the Indian loan program to finance tribal acquisitions whenever the tribe can reasonably be expected to repay the loan, and that the only action needed is to increase the statutory limitation on the amount that can be appropriated for the loan program. Bills have been introduced in Congress for that purpose, and the Department supports them.

The administrative partition or sale procedure can only be initiated by the Indian owners or by the Secretary acting on their behalf. Our draft bill recognizes that a non-Indian who owns an undivided interest in a tract of heirship land should also have some opportunity

to initiate a partition or sale proceeding. We have included a section that allows him to start a judicial proceeding for that purpose in the State courts subject to the safeguard that the Secretary must first determine that a judicial partition or sale will not affect adversely the interests of the Indians.

Finally, the Department needs additional authority to administer heirship lands effectively. As long as any lands remain in multiple ownership the Secretary should be authorized to execute leases, rights-of-way, and timber sale contracts whenever the inability to get the consent of the multiple owners interferes with the effective use of the land.

We do not propose to broaden the law with respect to the purposes or the length of time that may be covered by leases, but we do propose that the Secretary as trustee be authorized to proceed without the consent of the beneficiaries whenever necessary to perform his trust responsibility effectively. We regard this as an essential management tool to safeguard the interests of the Indian owners.

I would like to add one final word to this prepared statement, about the legal premise for this bill.

As we see it, the interests of the fractionated owners, although private property, are of an equitable nature. The legal title is in the United States, as trustee.

The purposes of the trust are as broad as the Congress makes them.

The substitute bill we have proposed suggests that the Congress delineate these trust powers in the heirship situation. The question is, have we asked the Congress to give powers which are violative of the protections of the Constitution.

Our bill is not in the nature of eminent domain action by the sovereign; it is in the nature of managerial action by a trustee.

The proposed procedural safeguards provided in the bill for the exercise of this management responsibility by a trustee should not be taken as indicia that there is a taking; rather, they set the standards whereby the trustee, the United States, is to be measured in the exercise of the trust responsibility—in a word, the standard of prudence.

In this context, we are dealing with the law of trusts, not the law of eminent domain.

As trustee, the United States has title to thousands of acres of idle land, of no economic value to the equitable owners, in its present status. Would a private trustee be criticized as imprudent in a comparable situation for selling the corpus of the trust, with the beneficiaries by definition now receiving nothing and with no prospect of receiving anything in the foreseeable future for their fractionated interest, to receive over a term of years their respective shares of the fair market value of the land sold. Does the trustee have to guarantee payment to the beneficiaries himself? Does he have to lend the money to the purchaser with which to make the purchase? Does he have to take a purchase money mortgage necessarily?

We feel that all these questions must be answered in the negative.

I should like to conclude this brief statement by urging the committee to give serious and prompt consideration to this whole general subject matter. We are convinced, as the committee is, that the need for constructive legislation in this field is urgent, and we feel sincerely that the Department's draft represents a start on this program which

more nearly meets the administrative problems and the policies which we think ought to prevail than does the bill S. 1392.

That is the conclusion of my prepared remarks as submitted to the committee. I will be glad to answer any questions or develop any points further that the committee may desire.

Senator CHURCH. I would like, first of all, to defer to the other members of the committee because my questioning will be lengthy here, and I would prefer that other members have first opportunity to ask such questions as they would like.

Senator Gruening?

Senator GRUENING. I would like to ask Secretary Carver whether the Department has made any study of the extent to which this problem applies in Alaska where, as he knows, the situation with regard to Indians and Eskimos is substantially different from what it is in the other States.

Mr. CARVER. I don't know of any formal study, Senator Gruening. I might say sort of parenthetically that a rather comparable problem exists at the village of Hoonah, but it is a little different, although the heirship situation there has come about by reason of the fact that these new town lots were put over the old ones, and the houses were built on the new ones. So the heirship just went on automatically on land not related to the houses.

But I would think—and I will ask the Acting Commissioner to correct me—that in a general way we do not have this problem on any wholesale basis in Alaska.

Is that correct?

Mr. MANGAN. That is correct.

Senator GRUENING. Well, I think it would be helpful if, before the problem becomes a large one, we got all the information about the existing situation there, and then, if this bill is enacted, move to correct whatever there is there as quickly as possible.

Mr. CARVER. I am sure we will do that, Senator.

If I understand correctly, the occupation by the Indians and the Eskimos and the Aleuts in Alaska is on public land, much of it not surveyed as yet, and therefore not in the same status as we have in the reservation situation here.

Senator GRUENING. That is right.

Well, the reservation situation in Alaska is substantially different than what it is in other States. There are a few so-called reservations, but they do not have the same status. The land is owned by the Government and it is not in the same condition as here in the old 48 States. It differs as regards different reservations, and I hope that will be made a subject of an actual study so we will have all the information?

Mr. CARVER. Yes, sir, it will be.

Senator ALLOTT. Mr. Chairman.

Senator CHURCH. Senator Allott.

Senator ALLOTT. Mr. Chairman, I would like to make a very brief statement, and this statement is not in criticism in any way of the people involved.

I do believe that the study of the committee and the staff on this matter is one that had to be made. We will hear later, I presume, from the General Accounting Office in a statement which points up in many ways the necessity of our acting in this field.

Without being critical of the individuals involved, I must say, Mr. Secretary, that I cannot feel, at least upon a preliminary reading and study, that the substitute bill constitutes any attack at all upon the problem which this Nation faces, or that this committee faces in its responsibilities on the Indian heirship land problem.

We have the situation, to go into the historical background very briefly and superficially, where a new land was conquered by a very young and aggressive nation. For the first time I believe in the history of mankind an attempt was made to give a preferred status and preferred treatment to the conquered people. As a result of that policy which the American people adopted, and I say it is a humanitarian policy with which I agree, the Federal Government has paid out hundreds of millions of dollars and is still in the process of paying hundreds of millions of dollars out to various Indian tribes for land which historically prior to that time would have gone to the conquering nation by right of conquest.

As I say, the American people have modified that right-of-conquest theory.

Now we have been, since the entry into the Nation of the Western States of continental United States, from 60 to 75 years and longer dealing with this problem, and all we have ended up with is a series of greater liabilities. We have not made any substantial progress in the solution of our problems.

I may say that I do not believe we have made any overall substantial progress in making the American Indian as a whole, or preparing him for a status of full citizenship to release him from the trusteeships which this Federal Government has.

With that preliminary statement, I would like to ask a few questions with respect to your substitute bill.

I have been informed that of the 6 million acres of heirship land, the problem is overstated. How much of this is actually idle and unproductive?

Mr. CARVER. Well, I think, Senator Allott, that we don't know in any exact way. Not all of it by any means. As a matter of fact, it may be a quite small percentage overall. However, on individual reservations it may run sometimes a third and up to a half, I believe, of the land which is idle or unproductive.

Whether that is related to the heirship status and whether it is related to the general poor nature of the land I am not at all sure.

Senator ALLOTT. Well, it depends on what you mean by unproductive. There are certain lands in the arid West that can never be productive in a real sense of the word unless you happen to find a mine or mineral value there or an oil or gas value. But in the sense of grazing or agriculture, they might never be really productive.

Many of these lands are certainly productive to the extent that they are capable of being productive, aren't they?

Mr. CARVER. That is absolutely true, Senator. By "unproductive" I think we mean not yielding the potential of their own nature, whatever it may be. Some of these lands are grazing areas. Some of them, as, for example, in my State, and the chairman's State, some of the lands are very fine irrigable lands located on an irrigated, developed project which are not under water simply because of the fractionated status of the ownership.

Senator ALLOTT. Well, we have pending before Congress the San Juan-Chama, the Navajo project, which would place a great many thousand acres under irrigation. In this respect, is the status of these lands any different from the status of many other lands in the United States?

Yesterday we considered before this committee two reclamation bills which would place considerable more lands under irrigation. But is the status of these lands any different than any other of the lands of the country?

Mr. CARVER. Yes, it is.

If I understand your question correctly, Senator, in many of these cases we have so many owners, the number of record owners may be 20, 50, sometimes 100 and there is nobody in charge, nobody managing the land. It grows up to weeds because to get land under water somebody must put it under water, and there is no one to do it.

In other places we—

Senator ALLOTT. Is this land that is under trust status to the Government?

Mr. CARVER. This is allotted lands which were allotted some years ago, and then the lands have been progressively or successively probated to the point where there might be 50 or 100 heirs to a 10-acre or 40-acre tract. That is the place where we would like to start.

Senator ALLOTT. If you can't do it now, could you provide the committee with some kind of a guideline as to how much of this land is actually unproductive, completely unproductive due to this status? You have indicated that you can't do this offhand.

Mr. CARVER. We can't do it offhand.

Senator CHURCH. Let me say at this point, Senator Allott, that we have had estimates before based on pretty competent studies and based upon the studies of the two congressional committees which would indicate that roughly 471,000 acres of this land is not being used, is unproductive as I understand we use the term. That is about 8 percent.

Mr. CARVER. Yes; that is right.

Senator CHURCH. Of the total amount of the land. So let us start out in some clear perspective. We are only talking about 8 percent of the problem and leaving 92 percent of the problem out when we talk about this solution with respect to the unproductive land. That is hardly a big step forward in my judgment.

Mr. CARVER. I think, however, Senator, I would agree and I stated it in my statement. We haven't got the complete answer. Congress has since the 81st Congress had before it each year bills to attack this heirship problem. The reasons why they have not been acted upon favorably would be better known to the Senators than to me. Nevertheless, one of the reasons, it seems to me, is that the problem is so big, and it involves so many aspects, that you can't get everybody to agree on something that is going to solve all of it.

We are only talking about one section of our substitute draft bill, the economically unproductive lands. There are other sections which cover other segments of it in the bill, I might point out to Senator Allott, that the chairman is quite correct.

Senator ALLOTT. Well, we can only talk about these things one at a time.

Mr. CARVER. That is correct.

Senator ALLOTT. I am referring to part II of the staff study, page 895 and subsequent pages, 896 and 897. In going through these various areas of Indian lands here I note that there are about three areas, three reasons for nonuse.

The title of this section is "Reasons for the Nonuse of Heirship Lands." The first use or the first reason that I note recurs over and over and is the fact that the land is unfit for use except to a very minor degree. The second reason I note is that absent or multiple heirs make leasing difficult. And then there are other different reasons assigned here.

But isn't the problem, if it is a multiplicity of heirs, a problem of providing legislation for the leasing? Why does the land have to go back into tribal ownership and then why do we have to start this cycle all over, as I believe the administration bill does? Rather than accelerating the solution of this problem, it is going to defer it for many years.

Mr. CARVER. Well, in the——

Senator ALLOTT. Why can't we provide laws, if this is the crux of the problem as you state, why can't Congress provide laws by which this land can be leased and administered without going the full cycle of putting it in tribal ownership and then coming back with all the difficulties that we would have?

Mr. CARVER. Well, let me take those questions one at a time.

The first answer, of course, is that by broadened authority for leasing, the problem itself continues to multiply. That is, the number of owners continues to increase in geometric progression, and the fact that you have had land under lease only means that you have got it in production, you are still having the problem of what to do with the lease money.

Senator ALLOTT. Let us stop at that point. Why can't we provide laws which will permit the leasing of the land? Let us just stop it at that point and we will take up the other question in a moment.

Mr. CARVER. We do have that. We have a provision in the law, and we have sought to improve the provisions in the law, which facilitate the leasing without having, as at present, to get the consent of all of the owners. And our draft bill has that provision in it.

Senator ALLOTT. And you can under the present law now do this?

Mr. CARVER. We have recognized that that is possible. We have stated, and I am sure that the Department can back this up, that the present laws are very cumbersome and need improvement. They are very difficult to carry out now as they are presently written. We would like to cut through this jungle and have leasing authority, and timber sales authority in the manner suggested in the draft bill.

Senator ALLOTT. I don't have your bill before me here.

Mr. CARVER. It is attached to our report, Senator Allott.

Senator ALLOTT. In section 4 of your bill you provide that when the Secretary determines that the fractionation of ownership interest is preventing the effective use of any trust or restricts the land which would otherwise be authorized by law, to execute or approve a contract for lease, he is authorized without the request or consent of the owner to execute a lease for the use of such land, execute a con-

tract of sale on any of the timber, and to grant a right-of-way or easement over such land which is binding upon the owners of both restricted and unrestricted interests.

Why should not a consent from an individual owner be obtained in this matter?

Mr. CARVER. Well, the answer to that, in a word, is that that is what is keeping us from getting it done now. We can't get the consent of—

Senator ALLOTT. Yes, but your provision would authorize this without even a request from a single owner.

Mr. CARVER. That is correct.

Senator ALLOTT. In other words, what we are doing here is abrogating a generally established and developing law with respect to the case of a joint ownership of land, and I know of no State law which is different than this. Any single one of the owners of that land can request a partition of that land.

Why shouldn't we start putting this whole matter back in the general body of law? You are going the other way.

Mr. CARVER. In a way, yes; we are going the other way, and for the reasons we have pointed out.

Before I deal with the broad policy question let me say that there isn't anything to prevent any individual owner from asking that the Secretary take this action. What we have proposed is a sort of self-starter here. If the land lies idle, and the Secretary determines that the reason is because of this multiple ownership, then he can initiate the action and at least get it leased.

But as to the other matter, as to the right of partition, therein lies the major difference between the Department's recommendation and the chairman's draft bill. The Department has recommended a policy which will protect the Indian land base, and we feel that the right of an individual to invoke the action of partition and the concomitant end of the trust status and the taking of the land away from the Indian land base is less desirable than to deal with the tribe as an entity in the preferential way, as we have in our draft bill.

But you are quite right, Senator. That is the exact point.

Senator ALLOTT. Well, it has been pointed out repeatedly both by individual members of this committee and otherwise that this multiple ownership has been a very sticky problem. But you do have the power to lease. But my question is still why should not the general body of our accepted law of our States, which does permit an individual owner of a tenancy in common, to permit the partition, to request the partition—Why should that not be applicable to this group of people after they have been under Government tutelage for 75 years?

Mr. CARVER. The Congress can make it so. We feel that to do that would be to move in a direction with reference to our responsibilities in Indian affairs which would be unfortunate, because in any one of these pieces of land there will be an owner who will, if only one owner is required, either on his own motion or under some urging, be able to institute the common law action of partition. As the Senator well knows, this starts the proceedings, starts the matter in motion, and eventually the court has to make a partition or make some kind of an order based upon all the facts and circumstances that come out.

Senator ALLOTT. But this would not be true under your bill?

The whole subject, the whole discretion in the matter is left to the Department.

Mr. CARVER. We have provided that this procedure take place with the consent of the Secretary. In other words, we have not cut off judicial partition as an approach, and in many cases that would be the proper approach. However, we have started with the judicial partition as an opening for the non-Indian rather than the Indian owner of a share of this land.

Senator ALLOTT. Well, you have preserved here, dealing with the section we are talking about, the right of the Department which is a subdepartment of the Department of Interior of which you are an assistant secretary, so that when we speak of the Department and the Secretary we are speaking of the same people.

Mr. CARVER. Yes, sir.

Senator ALLOTT. Ultimately the policies of the Secretary are going to be promulgated in the Bureau of Indian Affairs.

Mr. CARVER. Yes, sir, that is correct.

Senator ALLOTT. With respect to placing all of the prerogatives here in the hands of the Bureau of Indian Affairs or in the hands of the Secretary, I would like to call your attention to some remarks made by the Secretary himself on page 27 of the recent hearings on S. 174, commonly known as the Wilderness Act, in which he said:

I am sure my colleague from Arizona would agree this would be most high-handed for us to move in arbitrarily and tell the Indian people what is going to be done with their lands. I have never favored doing this in any of our dealings with the Indian people.

And then a little later, on page 28, he said this:

We are trustee for their land, but if we really believe that we are trying to teach them how to deal with their own land and make decisions, we don't arbitrarily move in on them and say this is the way things are going to be done.

That is the end of the quotation, and I would like to suggest that this is inconsistent, the statement of the Secretary in that hearing, with the whole purpose and theory of the bill which has been introduced in the House, H.R. 8077.

Mr. CARVER. Well, I would respectfully disagree with the Senator that this is inconsistent. To take this matter in steps, the alternative is the partition matter, or the alternative here at this point suggests judicial partition or administrative partition upon the application of one owner.

I respectfully point out that once that proceeding is started there isn't any consensual basis for the Indians as to all of the rest which may be 99 percent.

Senator ALLOTT. Any what kind of a basis?

Mr. CARVER. Any consensual. They don't have any right to say yes or no. Once the proceeding is started and they are brought before the court in a proper manner, this would be an interim action so they could be served by publication. The fact that they might object or have different ideas would be only a matter that they could present to the court whereas the Department's bill goes much more in the direction of the policy statement by requiring a majority as a basis for the action, or initiation of the action, if you will. And it also provides that the management entity which we prefer to deal with

would be the tribe because we think that works in the Indians' interests, rather than have this land broken up and to have unrestricted checker-boarded interests in these lands which have heretofore been regarded as the Indian land base.

Senator ALLOTT. Well, I find it difficult, Mr. Secretary, to find and accommodate myself to the idea that the basic principle of the law of partition which has been developed through hundreds of years and is the common law and accepted as far as I know in every State of the Union, is not equitable with respect to these people.

Mr. CARVER. I didn't mean to suggest that at all, Senator Allott. The protections of the common law obviously would be equally applicable here. The question which I would raise, however, is whether or not the court having jurisdiction of these matters would be guided by the same policy considerations for the Indian welfare and Indian benefit as the Congress has provided.

Senator ALLOTT. Would you enlighten me on another matter? As I understand it, having proceeded, you would issue certificates of indebtedness, and these would be owned legally or in trust. Which? By the tribe?

Mr. CARVER. Our bill is silent on that point. I think that they would be of the nature of personal property and unrestricted, although I believe the Secretary could provide for a restricted status for them under the general powers conferred upon him by the Congress.

Senator ALLOTT. The actual value of the interest of any one Indian owner is in many instances very little, as we know. If his interest is sold, he gets no cash. The certificate of indebtedness would be issued and you still are not away from your fractionalization, are you?

Mr. CARVER. Yes, I believe we are away from it. At least the ownership of the land is now in one entity, the tribe, or whoever has purchased it. He has got a piece of personal property, but it isn't an interest in real property.

Senator ALLOTT. But you only converted your fractionalization from one of land to one of a piece of paper.

Mr. CARVER. But we would end the fractionalization from there on. It wouldn't devolve in the same way that real property does. That would be the end. It would pass from him—not to his heirs, but to his administrator upon his death.

Senator ALLOTT. What would your remarks be with respect to the power of the Secretary to execute an oil and gas lease, for example, without the consent of the Indian owners?

Mr. CARVER. Well, I rather think that it would be covered by section 4. We haven't made any distinction between mineral interests and other interest in lands.

Senator ALLOTT. And he could do this?

Mr. CARVER. I am sure he could under the wording of this bill as we have suggested it; yes, sir.

Senator ALLOTT. Do you think this is in conformity with the body of American law on this?

Mr. CARVER. Well, if you read that in connection with the limitation on section 4, and read it in connection with the general powers of the Congress over Indian owners, I would say yes, it is in conformance.

Senator ALLOTT. But it is a continuation and extension of the trust concept of handling Indian affairs and the continuance of it ad infinitum.

Mr. CARVER. Well, until the Congress determines otherwise. But it is a continuation, yes, sir.

Senator ALLOTT. This is another question that has arisen. If you have to have consent under your bill by holders of a majority interest, aren't you running into exactly the same problem that you now have with respect to the handling of these lands? And I just referred a little while ago to part 2 of the report. I believe it is on page 895, which gives the reasons for the nonuse of land, one of which is the high degree of fractionalization, and this has been pointed out very well in the GAO report.

If you have to have under your bill a majority of people how are you going to get the majority to agree to anything like that when you can't even get them to agree to a lease which would produce some income?

Mr. CARVER. Well, maybe we can't. We will get it in more cases than we now get it. We will make progress. We may have to come back to the Congress and say this isn't working as well as we had hoped, but we certainly think that is more manageable than the present limitations which the law imposes upon us.

Senator ALLOTT. Then I would like to inquire why a preferred right to purchase at the sale is given to the tribe and not to an individual member of the tribe also.

Mr. CARVER. Well, there are two answers to that. I can—

Senator ALLOTT. Particularly, may I interrupt you, Mr. Carver, when a member of that family may have been occupying this particular land, or members of the family for many, many years.

Mr. CARVER. Well, to put another factor in there—and I don't know just at which point to start, but let me say on the policy question, we are recommending that the tribe be given a preferential basis and not a preferential basis be given to the individual Indian, leaving out the residence question or any equitable consideration which you raised in the second part of your question.

Let me say that the substance of the task force report and the substance of the departmental thinking and the Secretary's thinking is that we should, where possible, build upon a tribal land base rather than an allotted or individual land base so that we can have better management units of it.

Senator ALLOTT. Well, then you are thinking in terms of continuing the trusts and governmental responsibility with respect to this rather than in terms of divesting the Government of responsibilities.

Mr. CARVER. We are thinking of a continuation of Government trust responsibilities with reference to the tribal entity, the organized tribe. We would like to get away from—and this bill gets us away from—the trust responsibility that we have with so many hundreds and thousands of individual owners. We still stay, as I am perfectly frank to admit, with the trust basis for being in the Indian business. It is quite a little bit different for an Indian tribe which, of course, doesn't have heirs, as a continuing organized body, to have the beneficial ownership with the trust title in the United States than it is for individual Indians, who die and who have heirs, to then succeed to these interests to have this trust relationship.

Senator ALLOTT. Well, you have emphasized the status of the Government as a trustee, and, Mr. Chairman, I don't want to take up all the time this morning, but these questions are very important.

Senator CHURCH. You take all the time you want, Senator.

Senator ALLOTT. If the committee wants to file a petition of cloture on me, I will accept it.

Senator CHURCH. I deferred to you in the first instance. You go ahead and take all the time you want.

Senator ALLOTT. I say these questions go to the basic things we are trying to solve.

You emphasized over and over the point that the Government is trustee. If you give a preferred right to the tribe in an instance to purchase rather than the individual, which is the question we have been discussing, the obligation of a trustee upon the disposition of any assets of the trust would be to secure the highest price for the beneficiaries of the trust without respect to who is the purchaser.

Now if an individual owner who had resided on this land was willing to purchase at a price higher than the tribe, what would be the reaction of the Department?

Mr. CARVER. Let me say at the outset that I would quarrel just briefly with the major premise of your question, so far as the United States is trustee. In other words, the United States as trustee for these lands would be governed by such policies as the Congress of the United States should specify. It would not necessarily be to get the highest price for the individual at the given time.

Senator ALLOTT. Well, suppose you were an Indian and had a family—because most of these came down this way from one common source generically—with a particular tract and it was decided that that would be sold. Don't you think that, in all justice—and I am talking about simple equity—you have a right as a member of the tribe and individually to see that this land brings to you individually and as a member of the tribe the highest price than it can bring without respect to the rights, any preferential right, of the tribe to bid on it?

Mr. CARVER. Well, in a general way—

Senator ALLOTT. I think this is a fundamental principle of trust law.

Mr. CARVER. I think in a general way that would be the most important consideration, but I would respectfully say that Congress many times specifies that we shall handle these lands in a different way than to get the highest price, and I think it would not only be legally justifiable but I think it would be highly appropriate for the Congress to consider what would be the long-term benefit or the long-term aspect of the question of sale versus transfer to the tribal entity. And one of the things the Congress would consider would be, for example, what would the continuing obligation be with reference to that tribe if this land should be taken out of the tribal ownership.

Again let me say suppose it is timber. Obviously, the individual owners now alive may prefer to sell the whole thing to the X Lumber Co. and get the money now. On the other hand, the Department, Congress, everyone concerned, may think that it is far better that this be managed on a sustained yield basis or that other action other than outright sale be adopted.

Senator ALLOTT. Well, let me return to the substance of the question I just asked, which is the obligation of a trustee. You will recall, and if I recall my facts correctly, in the Menominee situation the Federal Government suffered a damage suit and the payment of a claim of \$8.5 million for failure to exercise, and truly, the full power of its trusteeship. In other words, this was based really upon a misfeasance or a malfeasance of the trustee, the Government. It cost the Government \$8.5 million.

By taking this direction with respect to the tribal preference which you have suggested, aren't we in fact placing the Government in a situation where subsequently members of the tribe or individual members of the tribe may come back at the Federal Government again for the same kind of misfeasance or malfeasance or simply a failure to act with the precaution that a reasonable man would exercise in the control of trust property?

Mr. CARVER. Well, I think the Senator has put his finger exactly on the heart of the matter that we are talking about—what standards should guide the trustee.

Basically, I would say that the ordinary private trustee might have the obligation to get the highest dollar amount. I think the Government as a trustee has got to look to the overall policies of the Congress in connection with the Indian programs, and I think that it would be proper and appropriate for the Congress to provide that the tribe should have a preferential right to purchase even though some individual may be willing to pay more as of that time to buy it himself or for somebody else's account.

Senator ALLOTT. I would like to ask you another question now. Referring to section 6 of your bill, this provides that the owner of an undivided, unrestricted interest in trust or restricted land may petition the Secretary to consent to the partition of such land. But it also provides that it can be done only when such action will not adversely affect any Indian owner.

This means, as I interpret it, that there are 200 Indian owners of a given tract of trust land. The judicial partition would not be available if it affected adversely the interests of any single owner. Now this is what the words say.

Do you think that the petition of an individual owner for the partition of land would ever occur under circumstances where you have numerous heirs, where one could not prove that it affects him adversely?

Mr. CARVER. Well, I suppose that I could start by saying that the Secretary is given the right to make this determination, and I think his determination would be final unless they can show that the Secretary in making the determination was guilty himself—

Senator ALLOTT. I don't think there is any question that it is his determination, that it be final, but he has to make this determination on principles of equity.

This is not an arbitrary or capricious determination that he will make. He would have to make it upon principles of equity, and if he makes it on principles of equity I doubt that there would be many instances where a single individual couldn't show that it affected him adversely.

Mr. CARVER. That particular language may require amendment. I won't hold fast to this. There has got to be a cutoff point at some time, and this action by the Secretary, I doubt, would be clothed with procedures to get all of the objections in that everybody might have in a formal way. But in certain cases with high values it would have to be. So perhaps we will have to make some changes. But in a general way I do think that the judicial partition action, open to the owner of the undivided and unrestricted interest, in this particular section goes into the court, and once it goes into the court, then all of the equitable aspects would be considered. We have no way of controlling the court.

Senator ALLOTT. No; but this doesn't answer the question as to the adverse affect on an individual owner.

Mr. Secretary, you have been very patient with my questions, and I appreciate your answers even though I don't agree with a lot of them, and I will yield, Mr. Chairman, to the other members of the committee at this time.

Senator CHURCH. Senator Anderson?

Senator ANDERSON. I regret, Mr. Secretary, that I didn't hear all the conversation, but I just heard you say this bill which you submitted you don't hold fast to. Would you send us one you do hold fast to?

Mr. CARVER. We hold fast to it, Senator Anderson, and I am glad to hold fast to it. But I would not say that any draftsmanship I ever completed would be so final that someone couldn't say, "Well, do you really mean what you said here?"

Now, the Senator brought out one point here in the second section of section 6, that the Secretary shall grant such consent if in his judgment such action will not adversely affect any Indian owner. As I now look at it, I would say "will not substantially adversely affect" or put some weasel words in there so that we wouldn't have the—

Senator ANDERSON. Of course, weasel words are a great help in drafting laws, but people like to know what they mean.

Mr. CARVER. Yes, sir; I didn't put enough of them in. We do hold fast to the bill. I don't mean to withdraw from it, except I wouldn't be so bold as to say that nobody could improve on it, on anything I ever did along that line.

Senator CHURCH. That is going to be the effort of the committee, Mr. Secretary.

Senator ANDERSON. A little weaseling now and then is probably a good thing.

Mr. CARVER. I will weasel a little on that one.

Senator ANDERSON. I was very much interested in what Senator Allott was asking about what standards guide the trustee. Did I misunderstand you? I wrote down here "The Government might decide that a tribe should be allowed to buy even though an individual would pay more."

Is that your theory or not?

Mr. CARVER. It could not be at any price less than the fair market value.

Senator ANDERSON. I am not saying that. The question was—I am quite sure the testimony would bear it out, the transcript will bear it out—that you suggested that the Government might decide the

tribe should be the purchaser even though an individual might pay more.

Mr. CARVER. Yes, sir; I said that, and that is what the bill says.

Senator ANDERSON. In view of this *Menominee* case in which the Government did get judgment against it for \$8.5 million for the way it ran the forest, would there be some action against the Government as guardian for selling a piece of ground to the tribe as against an individual willing to pay more for it?

Mr. CARVER. I think not, Senator Anderson.

Senator ANDERSON. You think not. Do you think it is permissible to handle the property of a person for whom you are trustee and sell at a lower price than the highest price and still not be liable?

Mr. CARVER. I think that it is proper to sell land to preferential types or congressionally specified preferred types of purchasers without subjecting them to the escalation of auction.

Senator ANDERSON. Can you give me some precedents to show that it is permissible for the trustee to decide the type of person to whom he shall sell as against the price offered for the protection of private property?

Mr. CARVER. I don't believe the trustee should have that authority. I think Congress should specify it, and that is what we are asking.

Senator ANDERSON. The Congress is going to do it. The Congress can pass all kinds of bills, you know. I got launched into the House of Representatives at a time when the Indian Affairs Committee was a very vigorous one, and they came along with the Indian Claims Commission so the Congress wouldn't have to consider jurisdictional bills over and over again.

If you go back and take a look at the flood of Indian claim bills that were constantly before the Congress alleging all sorts of mismanagement by the Government of property, you would realize that that doesn't seem to be the route to follow, or so it strikes me.

We have an Indian Claims Commission that was created. As a matter of fact, one of the positions on the first Indian Claims Commission was offered to a person in the Department of Agriculture. I talked him out of it because it didn't look like very permanent work. I made a great mistake. It could have been passed on from generation to generation, even to the ends of the earth, and not get through with the work of the Indian Claims Commission. Nobody expects it to be through in 50 years, do they really?

So you open up a door in here as in the *Menominee* case, that the trustee sells at a price lower than some individual buyer would pay.

I may say I admire greatly the work Senator Church has done in trying to prepare a bill on this heirship problem. One of the things I believe in his bill is that it gives an individual a right to come in and try to buy this land instead of transferring it all to the tribe.

Is it now the position that you prefer to have these lands move into tribal ownership as against individual ownership?

Mr. CARVER. Yes, sir.

Senator ANDERSON. You want them moved into tribal ownership. Can you give me a reason why you think it is better for the tribe to own them than for individuals to own land? We constantly lecture about giving the Indians a chance to be a part of the community and an individual who can handle his own property and so forth, and here

is a step that says, yes, he can handle his own property except we want to move it back to the tribe and let the tribe handle it, which is exactly the reverse of that, isn't it?

Mr. CARVER. Well——

Senator ANDERSON. Why do you want the tribe to have it as against the individuals?

Mr. CARVER. You have to remember, first, that we are dealing with allotments which were made 40 or 50 years ago; that is, the general unit that we deal with is the actual metes and bounds of an allotment which was made.

Those allotments were made generally without reference to the land's productivity. In some reservations they said you get 10 acres for a homesite here, and you will get 80 acres over here for grazing. And then this land has been checkerboarded that way.

Senator ANDERSON. Is that bad?

Mr. CARVER. Yes, sir, because——

Senator ANDERSON. I don't want to remind you, but my father was an immigrant from Sweden, and they all believed that Jim Hill was the greatest man that ever lived. In those days you could take 160 acres for a location and then you took the diagonal 160 acres for a free claim. Perhaps it was much better to have them side by side, but the Government didn't want it done that way.

Do you think that is a valid reason why you should dispose of it to the tribe instead of the individual?

Mr. CARVER. Well, that may not be the reason, but I was just setting forth the historical precedents explaining why some of these units were not economically useful to the allottees from the very outset. In other words, by themselves, individually, they didn't mean anything. It wasn't enough to live on, and could not under the circumstances existing be consolidated into anything that was enough to live on.

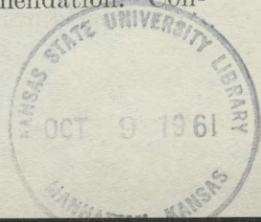
That being the situation, and generally speaking with the situations occurring on or near the boundaries of Indian reservations, they have got to be blocked up into some kind of units. They are going to be. Inevitably they will be blocked up into some kind of units by whatever bill is passed here. If they go into individual ownerships, then they will immediately be attracted back into some kind of a manageable unit by the ordinary process of purchase and sale. At that point the Indians, who have had a share in the allotment, will get something, and that will be the end.

In the meantime, what you have likely as not done is to break up the tribal land base. You may have non-Indians in substantial numbers holding land within the exterior boundaries of the reservation or within the general Indian land, so to speak, and this is pulled away forever from the benefit of that tribal group.

Obviously we can do it. Obviously that was what was tried to be done in the allotment act. We felt that if you put around this land and told these Indians they owned it individually, they would immediately start acting like non-Indians, like their neighbors in the adjacent communities. But it hasn't worked out.

Now we feel that the proper approach would be to take this land back into the tribal land base, manage it that way.

It is a fundamental policy question; it is a recommendation. Congress will decide. But that is what we are ——



Senator ANDERSON. Well, if Congress decides, on the basis of the light furnished it by the Department of Interior—you know the Department of Interior furnishes us this light—that the best way to own real estate is by the tribe and not by the individual. Is that a correct analysis?

Mr. CARVER. The Department is suggesting that we should strengthen the tribal land base rather than break it up.

Now there will be exceptions, obviously.

Senator ANDERSON. Are these individually allotted lands now owned by individuals and fractionated? Are they part of the tribal land base?

Mr. CARVER. No; they are not.

Senator ANDERSON. Then why do you keep talking about them as if they were in the tribal land base?

Mr. CARVER. They are lands which——

Senator ANDERSON. Does this bill do anything with the tribal land base the tribe now owns?

Mr. CARVER. No, sir.

Senator ANDERSON. Then why do we keep getting that into the conversation?

Mr. CARVER. Well, because we add it to the tribal land base. It is an Indian land base now. It is now owned by Indians, and it won't be owned by Indians if we go the other route.

Senator ANDERSON. Well, it might be.

Mr. CARVER. It might be, of course, in certain instances.

Senator ANDERSON. If they have rights to purchase.

Mr. CARVER. That is correct.

Senator ANDERSON. It is only by your proposal that says, "We will put it into the tribe," that the individuals don't have rights to purchase.

Mr. CARVER. Yes, sir.

Senator ANDERSON. Has Justice told you that this is a perfectly constitutional taking?

Mr. CARVER. No, sir; Justice hasn't told us anything. The Justice Department has told the committee that it isn't.

Senator ANDERSON. Well, would that bother you any? Would you want an unconstitutional taking?

Mr. CARVER. I don't want to get involved in——

Senator ANDERSON. But you are involved. You just involved yourself by saying the Department took a different position. Now, having said that, you are involved.

Mr. CARVER. Yes, sir. I am perfectly willing. All I was about to say——

Senator ANDERSON. Now do I understand that your testimony is that the Department of the Interior favors an unconstitutional taking?

Mr. CARVER. No, sir.

Senator ANDERSON. Well——

Mr. CARVER. I am entitled, I think——

Senator ANDERSON. If the Department of Justice says there is one, and you support your bill, how do you get off the hook?

Mr. CARVER. Well, I don't say that they are the final judges of constitutionality.

Senator ANDERSON. Oh, I see.

Well, you have lost faith in the Department of Justice.

Mr. CARVER. As to this matter I have; yes, sir.

Senator ANDERSON. All right; now we are getting somewhere.

Mr. CARVER. I made a part of my statement directed to that point, Senator Anderson, in which I suggested—

Senator ANDERSON. I regret I didn't hear the statement.

Mr. CARVER. They were saying, if I understood them correctly, that we had a bill in the nature of eminent domain, and I was saying we had a bill in the nature of carrying out of trust responsibilities and instructions by the Congress to the trustees as to how they should be carried out.

Senator ANDERSON. Well, I only suggest to you that once, when I was on the other side of the desk, I was subpoenaed by the august Members of the Senate to produce some records. I did not depend upon the counsel of the Department of Agriculture. I went to the chief law adviser, who was the Attorney General representing the Department of Justice, and if I was in a position where the Department of Justice said this is unconstitutional taking, it would make me pause a little bit.

Mr. CARVER. It has made us pause, but let me say I have not until just this morning seen their formal statement.

Senator ANDERSON. Well, I haven't seen it at all, except I understood that was their position.

Oliver LaFarge, who lives in my State and is highly regarded by many people in my State, and I among them, had an article in Indian Affairs for February 1961. I don't intend to read it all, but he said we need an Indian development fund, and I am very glad that this committee is stanchly in favor of an Indian development fund.

In the next paragraph, he says:

A portion of this fund should be promptly available for purchase of allotments coming up for sale by tribes that offer a sensible plan of land consolidation and use. All of it should be available for businesslike practice, general development programs, provided those programs come from the whole community as stated above. This provision will insure success—

and so forth.

Now, he would like to use this development fund to purchase some of these fractionated allotments, wouldn't he?

Mr. CARVER. Yes, sir; and that is possible under our bill.

Senator ANDERSON. Under your bill?

Mr. CARVER. We provided that loans could be made. We have said—

Senator ANDERSON. You are going to let the tribe buy. Aren't you letting the tribe buy these even if the individual offers more? The tribe will still get it if it wishes to do so. How does that let the individual buy them?

Mr. CARVER. I had the feeling, Senator Anderson, that Mr. LaFarge's position on this, and this is the first time I heard it, but I had the feeling he was in favor of the tribal approach that we have been talking about. I may be in error.

Senator ANDERSON. Oh, I don't attempt to say how Mr. LaFarge feels about this bill, whether he supports the Department's position or the Church bill. I was just trying to find something that I could anchor my faith to, and he says that he would like to have a develop-

ment fund, and he would like to use that fund so the individuals might purchase some of these tracts. That seems to me like a pretty good thing.

Mr. CARVER. There isn't anything in our bill that forecloses the individuals from doing that.

Senator ANDERSON. No; except that if he wants to bid \$10, and the tribe bids \$6, you would sell it to the tribe because you want to discourage the individual ownership of property.

Mr. CARVER. Well, I hope I haven't misspoken myself when I said—

Senator ANDERSON. I hope I haven't misquoted Mr. LaFarge or misinterpreted your position either.

Did you have occasion for review of the report on H.R. 5144, a bill which the House of Representatives has passed and is now before the Senate? It is a bill providing for the payment for individual Indian aid and tribal land of the Lower Brule Sioux Reservation in South Dakota.

Mr. CARVER. I have not, Senator Anderson. The chairman of the subcommittee announced he was going to take that up Tuesday, and told him that at that time—

Senator ANDERSON. How did it get out from the House without the Department of the Interior knowing about it?

Mr. CARVER. I am sure we did. I don't have it before me now. I may have signed the report. I don't recall it now. I would be glad to refresh my recollection if we had one at the table. We don't have one here at the table.

Senator ANDERSON. The bill H.R. 5144 is somewhat similar to the Church bill in terms of these fractionated lands and the Department recommended favorably upon it before the House.

Mr. CARVER. Yes, sir; that is correct.

Senator ANDERSON. A hundred years or so ago a man said something about a house divided against itself cannot stand. Is the Department of the Interior for one bill in the House and a different bill in the Senate?

I wish you would examine the report because it says:

Upon receipt of request from the required ownership interest, the Secretary shall notify the tribe, and each owner of an undivided Indian interest in the land by letter directed to his last known address for such owner—

and so forth, and—

The tribe has the right to purchase; that each such owner and the tribe has a right to purchase the land for its appraised value unless one of the owners objects within the time fixed by the Secretary or for a lower price if all of the owners agree.

When we get down into this thing we find that it has something to say about 25 percent of the owners. Do you want 50 percent over here?

Mr. CARVER. The fact—

Senator ANDERSON. Should we take this bill that comes to us now from the House and allow the individual owner to buy it and change it so that it shall pass into the ownership of the tribe and the tribe shall have preferred right to buy even at a lower price?

Mr. CARVER. Well, I think we misstate one point here.

Senator ANDERSON. I am just trying to get at a uniform policy.

Mr. CARVER. In dealing with what the Secretary may do, with what standards Congress authorizes him to apply, we have said that he may give to the tribe the preferential right to purchase.

Senator ANDERSON. I don't want to take the time—as my friend from Colorado generously suggested a while ago, we all ought to have some opportunity, and I will be glad to stop here if you will agree to furnish for the record an analysis of what H.R. 5144 does in this particular instance and what your bill would do under the same circumstances. I think you will find them in direct conflict.

Mr. CARVER. We will do that. I think that we will find that it takes a third approach, different from Senator Church's bill and different from the general bill we proposed.

(Subsequently Mr. Carver transmitted the following communication:)

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington D.C., August 23, 1961.

HON. FRANK CHURCH,
Chairman, Subcommittee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHURCH: During the hearings on S. 1392, the Indian heirship bill, you asked us to compare the various proposals that have been enacted or proposed. The major provisions of the various proposals that can be compared are as follows:

1. Fort Randall legislation for the Crow Creek and Lower Brule Tribes—Public Law 85-916 and Public Law 85-923:
 - (a) Fifty-one percent of the ownership interest may initiate administrative partition and sale proceedings. The sale is discretionary with the Secretary.
 - (b) The tribe and the individual Indian coowners have a preferential right to buy at the appraised value if 51 percent of the ownership interest agrees.
2. Oahe legislation for the Standing Rock Tribe—Public Law 85-915:
 - (a) Twenty-five percent of the ownership interest may initiate administrative partition and sale proceedings. The sale is discretionary with the Secretary.
 - (b) The tribe and the individual Indian coowners have a preferential right to buy at the appraised value if 25 percent of the ownership interest agrees.
3. Big Bend pending bills for the Crow Creek and Lower Brule Tribes—H.R. 5144 and H.R. 5165:
 - (a) Twenty-five percent of the ownership interest (if less than 10 owners) or 51 percent of the ownership interest (if 10 or more owners) may initiate administrative partition or sale proceedings. A sale is discretionary with the Secretary.
 - (b) The tribe and the individual Indian coowners have a preferential right to buy at the appraised value, if no owner objects.
 - (c) The tribe has a preferential right to meet the high bid, if no owner objects.
 - (d) The tribe and the individual Indian coowners have the right to compel an auction sale in order to have a better opportunity to buy.
4. S. 1392 by Senator Church:
 - (a) One coowner may initiate administrative partition or sale proceedings.
 - (b) The sale is mandatory unless the Secretary makes a finding and reports to Congress.
 - (c) The tribe and individual Indian coowners have a preferential right to buy at the appraised value, if no owner objects.
 - (d) The tribe and individual Indian coowners have a right to compel an auction sale in order to have a better opportunity to buy.

5. Departmental substitutes for S. 1392:

(a) Fifty-one percent of the ownership interest may initiate an administrative partition or sale proceeding. The sale is discretionary with the Secretary, and the effect of the sale on the community is one of the factors to be considered.

(b) The tribe has a preferential right to buy at the appraised value.

(c) One coowner can initiate judicial partition and sale proceedings, with the approval of the Secretary.

Both S. 1392 and the Department's substitute have other provisions that are not comparable.

Sincerely yours,

JOHN A. CARVER,

Assistant Secretary of the Interior.

Senator ANDERSON. Wouldn't it be nice to have a single approach?

Mr. CARVER. Yes, sir, it would.

Senator ANDERSON. Thank you.

Senator CHURCH. You will have an opportunity, Secretary Carver, to make that presentation on Tuesday when the bill that Senator Anderson referred to is up before the subcommittee.

Senator CHURCH. I notice that Senator Case is here and also Congressman Berry.

I don't want to dismiss you gentlemen yet from testifying, but I wanted to inquire if either Senator Case or Congressman Berry have a statement they would like to make, because I would like to oblige them and not keep them here an unduly long time. I am sure that the departmental witnesses would not object at all to deferring their testimony in order to accommodate you gentlemen.

Senator CASE. Thank you very much, Mr. Chairman.

I do have a statement that I would like to make. Congressman Berry also has one.

Senator CHURCH. Fine, Senator. Will you come forward then.

And, Congressman Berry, won't you accompany him, and we will be very happy to hear from you both.

STATEMENT OF FRANCIS CASE, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator CASE. Thank you very much, Mr. Chairman.

First of all, let me commend the chairman and the committee for having this hearing on this most important matter. This is a matter which certainly illustrates the old adage that justice delayed is justice denied.

This matter to which these several bills address themselves is one of long standing. It cries for relief.

I introduced bills on this subject in prior Congresses, but in this Congress the bill I introduced is S. 628, the 26th of January, which would authorize the partition or sale of inherited interest in allotted Indian land in South Dakota, to provide for an interim trust patent, and for other purposes.

I assume, Mr. Chairman, that bill has been made a part of the hearing. If not, I would like to have it included.

Senator CHURCH. We will make it a part of the hearing by placing it at this point in the record.

(S. 628 follows:)

[S. 628, 87th Cong., 1st sess.]

A BILL To authorize the partition or sale of inherited interests in allotted Indian lands in South Dakota, to provide for an interim trust patent, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, as used in this Act—

(1) The term "tribe" means any tribe of Indians located on a reservation within the State of South Dakota; and

(2) The term "Indian" means an enrolled member of any such tribe residing in the State of South Dakota.

SEC. 2. Except to the extent that they are inconsistent with the following sections of this Act, the laws of the State of South Dakota with respect to the probate of wills, the determination of heirs, and the administration of decedents' estates shall be applicable to the individual property of any Indian who dies after the date of the enactment of this Act.

SEC. 3. (a) Any person not being the sole owner but owning an interest in a tract of land situated in the State of South Dakota in which an undivided interest is now or hereafter held in trust by the United States for an Indian, or is now or hereafter owned by an Indian subject to restrictions against alienation on taxation imposed by the United States, may commence in a State court of competent jurisdiction in the State of South Dakota an action for the partition or for the sale of such lands in accordance with the laws of the State of South Dakota.

(b) For the purpose of any such action referred to in subsection (a) of this section (1) the Indian owners shall be regarded as vested with an unrestricted fee simple title to any such undivided interest which they might have in any such land, (2) the United States shall not be a necessary party to any such action, and (3) any partition or conveyance of the land resulting from such action shall divest the United States of title to the land, and terminate the Federal trust and all restrictions against alienation or taxation of the land imposed by the United States.

(c) The court costs, including reasonable attorney fees, of any court action commenced pursuant to this section shall be defrayed by the United States in accordance with such regulations as may be prescribed by the Secretary of the Interior.

SEC. 4. In any case in which the court in which an action is brought pursuant to section 3 of this Act for the partition of interests determines that partition is not practicable for any reason, the court shall, upon the filing of a petition for the sale of such lands by or on behalf of any person or persons having an interest in such allotted lands of 25 per centum or more, cause such allotted lands to be sold at not less than the appraised value of such lands, and the proceeds of the sale distributed among the persons having an interest therein in accordance with their respective interests. The share of any Indian who has been determined, as provided in section 6 of this Act, as being competent to manage his own affairs shall be paid to him without restriction. The share of any other Indian shall be placed to his credit in the "Individual Indian moneys" account with the superintendent of the reservation.

SEC. 5. (a) In any case in which land is to be sold pursuant to this Act, the tribe of the reservation on which such land is located shall be given a period of thirty days within which to purchase any such land at the highest bid therefor or at the appraised value, whichever is higher. If, at the expiration of such thirty-day period, the tribe has not purchased such land, and the highest bid therefor was made by a person other than a member of the tribe, any member of the tribe shall be given an opportunity to purchase such land within twenty days at such highest bid or at the said appraised value, whichever is higher.

(b) Any lands sold pursuant to this Act to a tribe, or to an individual member of a tribe who has not been determined, as provided in section 6 of this Act, to be competent to manage his own affairs, shall be held by the United States in trust for such tribe or individual member. Any lands sold pursuant to this Act (1) to an individual member of the tribe who has been determined by the Secretary of the Interior to be competent to manage his own affairs, or who has been determined, as provided in section 6 of this Act, to be competent to manage his own affairs, or (2) to an individual who is not a member of a tribe, shall be conveyed to the purchaser by a patent in fee.

SEC. 6. (a) After the date of the enactment of this Act, any Indian who meets any one of the conditions provided for in subsection (b) of this section shall be considered a free and unrestricted Indian and determined to be competent to manage his own affairs.

(b) A certificate declaring any Indian to have a free and unrestricted status and competent to manage his own affairs shall be issued by any court having naturalization jurisdiction upon application by any such Indian and a showing that he meets any one of the following conditions:

- (1) holding of an honorable discharge showing a minimum of two years of peacetime service in the Armed Forces of the United States or ninety days of wartime service in the Armed Forces of the United States;
- (2) graduation from a standard high school or its equivalent; or
- (3) meeting of the requirements for a certificate of naturalization.

SEC. 7. (a) Upon application to the Secretary of the Interior, a special interim trust patent or title will be issued to the holder of any Indian trust lands upon the date of issuance to him of his certificate of free and unrestricted status for all lands held for him in trust as of such date, and for any personal property acquired by or for him with restricted funds prior to such date, which will permit the Indian owner to contract for delivery of title in fee but which will keep such lands and property in a trust status and not subject to taxes of any kind until such lands and property are disposed of by him and title is transferred to another person.

(b) No lands or other property with respect to which restrictions are removed or a patent in fee issued pursuant to this Act shall be liable for the satisfaction of any debt contracted or lien incurred prior to such removal of restrictions or issuance of a patent in fee.

SEC. 8. In order to protect the interests of minor heirs and heirs who are non compos mentis, the court, in the State of South Dakota, before which proceedings are brought for the administration of the estate of any Indian shall cause guardians to be appointed for any such heirs.

SEC. 9. The Act of June 25, 1910 (36 Stat. 855), as amended, shall not apply to the probate of estates of Indians subject to the provisions of this Act.

Senator CASE. Briefly, this bill is adapted to our South Dakota situation where we have several tribes of Sioux Indians, and I will not burden the committee with going into its details at this time.

I would certainly have no objection to a general bill if it covered the problem for which we seek relief.

I noted with interest the questions that were addressed to the representatives of the Department, particularly with respect to sale and getting for the individual allottee the maximum sum. On that point I would like to read merely section 5 of my bill which proposes that:

In any case in which land is to be sold pursuant to this Act, the tribe of the reservation on which such land is located shall be given a period of thirty days within which to purchase any such land at the highest bid therefor or at the appraised value, whichever is higher. If, at the expiration of such 30-day period, the tribe has not purchased such land, and the highest bid therefor was made by a person other than a member of the tribe, any member of the tribe shall be given an opportunity to purchase such land within twenty days at such highest bid or at the said appraised value, whichever is higher.

This provision was intended to make it possible for the tribe to protect its interests in a consolidated tract of land if it so desired, or an individual member of the tribe, but still to preserve for the individual allottee the maximum amount offered in the bid or at the appraised value, and I call attention to that.

Senator CHURCH. I think that is very helpful, Senator, and I am glad you have called attention to that formula. This subcommittee, as you know, is very much concerned with the welfare of the Indians, and we would like to see an Indian program administered in such a way as to confer maximum benefits upon the Indians as not only tribes but as individuals. And it seems to me that your formula has

considerable merit in that it, first, gives the tribe the opportunity to buy at the appraised price or at the highest price that is actually bid. Secondly, it gives individual Indians a right to meet the highest bid if the tribe does not.

Senator CASE. As a member of that tribe.

Senator CHURCH. Yes.

And, thirdly, it provides that the land should go for the highest amount in order to give fair protection to the owners who are, of course, very much affected.

So I am glad that you called that to our attention. We will give it due consideration in our deliberations.

Senator CASE. I thank the chairman for his comments.

Mr. Chairman, recently I visited the offices of the Sisseton Sioux Reservation and happened to be there at a day when one of the clerks was working upon the division of money for rentals received on a certain lease of land. I brought two sheets along with me which I should like to place in the record which show the number of heirs that were entitled to a share in this lease money and the division of interest.

Just for the information of the members of the committee present, I would point out that in the case of lease No. 26723 the total lease money amounted to \$150, but there are two columns a page long of the heirs interested.

The maximum amount to be received by any one was \$31.25, but from there it goes on down to zero, and there are several interests of 1 cent and 2 cents, 11 cents, 7 cents, 8 cents, 30 cents, 33 cents, and divisions of that sort.

Senator CHURCH. Can you imagine a quagmire any worse in the efficient management and utilization of real property?

Senator CASE. No; I can't except that I have one more horrible example in the second sheet where there is only \$40 involved, and again two columns, a page long, of individual interests with the highest there being \$6.04, but most of them 5 cents, 51 cents, 9 cents, 6 cents, and figures such as that, where obviously it is going to cost the Government far more to write the check or keep the books, notify the Indians, and then probably cost the Indians 10 cents to cash the check when they get it.

Of course, I recognize that Government checks should be paid at par, but obviously it is a wasteful thing not in the interests of the Indians nor the best administration of the lands.

Senator CHURCH. Without objection, we will make the exhibits a part of the record.

(The allotment records referred to follow:)

1961 rental—Lease No. 26357, OR 937, October 26, 1960—Allotment No. 410, Frank Roy estate

R 267 Samuel V. Renville dec----	\$0.75	R 432 Charley Renville-----	\$0.05
R 86 Grace Renville-----	.25	L 257 Ellen Renville LaBelle----	.75
R 424 Augusta R. Redearth-----	.05	W 211 Mary Wanna Abraham-----	.45
R 425 Marcellaine R. Kirk-----	.05	W 212 David Wanna-----	.44
R 426 Violet R. Barse-----	.05	W 213 Elijah W. Peterson-----	.44
K 157 Elleraine K. Miller-----	.05	M 151 Andrew M. Brown dec-----	1.32
R 427 Rachel Renville-----	.05	B 327 Eugene Bull dec-----	1.32
R 428 Louise R. Jones-----	.05	R 114a Thomas Ryan-----	.60
R 429 Victor C. Renville-----	.05	D 168 George L. DeMarrias-----	.60
R 430 Juanita Renville-----	.05	W 349 Rose DeMarrias Wanna--	.60
R 431 Harvey Renville-----	.05	D 22 Ellen Hill Wanna-----	.60

INDIAN HEIRSHIP LAND PROBLEM

1961 rental—Lease No. 26357, OR 937, October 26, 1960—Allotment No. 410,
Frank Roy estate—Continued

H 75 James Hill	\$0.60	H 351 Norma Hisgun Enoch	\$0.06
H 390 Ephriam Hill	.60	H 352 Shirley L. Hisgun	.06
H 231 Elisha Hill	.60	B 308 James B. Kampeska	.25
H 232 Zack Hill	.60	B 225 Winfield Kampeska	.25
H 230 Alex Hill	.60	B 227 Alice K. Barse	.26
H 228 Solon M. Hill	.09	C 307 Roger L. Cloud	.82
H 229 Benjamin Hill	.09	R 181 Ephriam Redearth	.11
H 372 Hazel Hill	.09	R 330 Pauline Redearth	.07
H 373 Margaret Hill	.09	R 331 Irma Redearth	.07
H 374 Jennie Genevieve Hill	.09	R 332 Corrine Redearth	.07
H 375 Sampson Hill	.09	R 333 Leona Redearth	.06
H 376 Solomon Hill	.09	D 170 Narcisse DeMarrias (deceased)	6.03
S 124 Winfield St. John	.51	T 155 Everett Hisgun	.34
S 145 Alex St. John	.51	T 156 Alma Hisgun Dumarce	.34
S 146 Stephen St. John	.50	S 356 Albert Spider	.04
S 233 Esther St. John Keeble	2.51	J 94 Ephriam Johnson	.04
S 234 Elmer St. John	.50	S 358 Mabel Spider	.04
S 235 Edward St. John	.50	S 359 Jeanette G. Spider	.03
S 384 Sylvester St. John	.50	B 423 Baptiste Barker, Jr.	.06
S 385 Benedict St. John	.50	B 424 Darlene Fay Barker	.06
L 76 Glode LaFromboise dec.	2.03	B 457 Estella Rose Barker	.04
L 222 Julia LeBeau dec.	3.80	R 305 George Renville	.06
L 180 Walter LaFromboise	.44	R 347b Mildred Renville Rodeen	.06
L 181 Peter LaFromboise	.44	R 348a Everett Renville	.06
L 223 Julia LaFromboise	.44	R 349a Adeline Renville Johnson	.06
L 111 Angeline LaFromboise	1.33	R 350a Veronica Renville	.06
M 72 Lot Max	2.07	R 204 Arnold Renville	.06
L 34 Viola LaFromboise Goodbird	.44	R 199 Cyril Renville	.06
L 183 Stephen LaFromboise	.31	R 200 Jerome Max Renville	.06
L 184 Ida LaFromboise	.31	2224.3 Maggie S. Renville	.28
G 101 John Grant	.13		
S 355 Katherine Sing	.06		
H 350 Oretta Hisgun	.06		
		Total	40.00

1961 rental, lease No. 26723, OR 934, October 26, 1960—Allotment No. 990,
Joseph LaBlanc estate

L 16 Nancy LaBlanc DuMarce	\$31.25	D 187 James Damarce	\$0.06
F 139 Garnett F. Holman	.46	R 281 Jerry Robertson	.02
F 140 Harold Fitting	.46	R 209 Eva Robertson Dumarce	.02
F 141 Floyd M. Fitting	.46	W 437 Virginia R. Woods	.02
F 142 Irving Fitting	.46	R 282 George Robertson	.02
F 143 Ruby F. Sutton	.47	D 190 Alexander Dumarce	.01
F 144 Pearl F. Munzanreider	.47	B 130 Andrew Bear	.02
F 111 Ruby F. Greycloud	4.16	B 468 Jonah T. Bear	0.00
B 210 Myrtle Barse Tucker	6.24	B 469 Levi A. Bear	0.00
B 211 Walter Barse	6.25	B 470 Raymond L. Bear	0.00
B 9 William Baine	4.16	B 471 Marie Mae Bear	0.00
S 112 Henry Starlight Finley	5.00	B 472 Yvonne Jane Bear	0.00
O 103 Wallace Owen	1.00	B 473 Andrew Bear, Jr. (deceased)	0.00
O 102 Cornelia I. Owen	1.00	L 51 Lizzie Long Dumarce	1.90
T 167 Martina Thompson	1.00	C 116 Cankuskawin (deceased)	1.02
T 166 Zacharias Thompson	2.67	S 379 Barbara St. John	.33
E 8 Gilbert Earth	.83	S 380 Ramona Diana St. John	.33
W 434 Josephine W. Starlight	.83	S 381 Ambrose Sylvan St. John	.34
I 82 Stella Isaac Wanna	.28	L 99 Nancy LaBlanc (deceased)	5.00
W 502 Luella Wanna Quinn	.11	G 104 Philip Gray	1.67
W 503 Loretta Maxine Wanna	.11	G 107 Gloria Gray DeCoteau	1.67
W 504 Fred Wanna	.11	G 206 Charlotte Gray	1.66
W 505 Dolores Wanna	.11	D 86 Frank Demarce	4.60
W 506 Ernest Wanna	.11	D 87 James DeMarce	4.60
F 64 Johnson R. Finley	.84		
R 153 Agnes G. Redwing	.23		

1961 rental, lease No. 26723, OR 934, October 26, 1960—Allotment No. 990,
Joseph LaBlanc estate—Continued

D 104 Henry Demarce-----	\$3. 70	D 142 Melvin DuMarce-----	\$0. 70
T 128 Eddie Thompson (de- ceased)-----	4. 60	D 143 Lincoln DuMarce-----	. 70
G 92 Louis Goodhouse-----	. 30	N 26 Agnes J. Williams (de- ceased)-----	. 74
G 93 Mary Goodhouse-----	. 30	J 90 John Johnson, Jr-----	. 74
G 94 Michael Goodhouse-----	. 30	J 56 Anna Johnson Hayes-----	. 75
D 54 Nancy Demarce-----	2. 29	J 94 Ephraim Johnson-----	. 75
D 96 Frank Demarce-----	2. 29	W 459 Elijah White-----	. 37
D 68 Samuel DuMarce (de- ceased)-----	5. 21	W 460 Mary White Wetsit-----	. 37
D 51 Julia D. Redthunder-----	5. 21	J 108 Phyllis Johnson-----	. 37
H 279 Hantemazawin (de- ceased)-----	4. 16	R 417 Lorna Redwing Ander- son-----	. 37
L 71 Joseph LaBlanc-----	6. 25	J 123 Agatha Johnson-----	. 25
L 10 Cora L. LaBlanc-----	6. 25	J 124 Gregory Johnson-----	. 25
L 19 Peter LaBlanc-----	6. 25	J 125 Richard Johnson-----	. 25
L 337 Mabel LaBelle-----	. 08	2224.3 May E. Fitting-----	1. 38
L 338 LaVerne LaBelle-----	. 07	2224.3 Virginia Trujillo La- Belle-----	. 11
L 331 Connie May LaBelle-----	. 04	L 374 Donovan LaBelle-----	. 12
L 332 Deloris LaBelle-----	. 04		
D 139 John DuMarce-----	. 69	Total-----	150. 00
D 140 Reuben DuMarce-----	1. 39		

Senator CASE. For the sake of conserving the committee's time, I should like to place in the record also a statement I have prepared with reference to the tables I have just put in.

And then I should like to read a paragraph or two from an earlier statement and ask that this second statement, which I prepared some time ago, also go in the record.

The paragraphs from that that I should like to read were based upon the Comptroller's report which dealt with this problem and was entitled "Administration of Indian Lands by the Bureau of Indian Affairs." It suggested that the figure of 54 trillionths comes in as the lowest common denominator for the varying amounts of interest held by 99 heirs to a tract of 116 acres of land taken by the Army Engineers for Fort Randall Reservoir.

In South Dakota we have a series of Indian reservations along the Missouri River which are involved in these several land takings for the several reservoirs—the Fort Randall Reservoir, the Gavins Point, Big Bend, and Oahe, and in taking a tract of 116 acres of land the Army Engineers found 99 heirs, and to get the lowest common denominator for the various amounts of interest, it would go to 54 trillionths to get the share that would be applicable.

Now the thing is a little worse than that because one of these goes to an estate. These figures, I think, were 2 years old. How many additional heirs would be uncovered by the time that estate is probated is difficult to surmise or guess, but it all points up to the acuteness of this problem, and certainly in the best interests of the Government and the best interests of the economy of the land administration and of the individual Indians, some action should be taken.

I compliment the committee for addressing itself to it.

Senator CHURCH. I think, Senator, your figure with respect to the smallest fractionated interest in that one parcel of land, if my computation is correct, would be comparable to 1 cent or less as a fractionated part of the total public debt of this country.

Senator CASE. Well, I am not going to challenge the chairman's figures.

Senator CHURCH. The fractionated interest in that piece of land would relate to the whole parcel of land as 1 cent would relate to the total public debt.

Well, I appreciate your testimony, and both of the statements will be incorporated at this point in the record.

(The documents referred to follow :)

STATEMENT BY SENATOR FRANCIS CASE

The acquisition of lands by the United States in connection with the construction of the dams and reservoirs on the main stem of the Missouri River has pointed up the urgent need for authority to resolve the fractionated and multiple land ownership on Indian reservations.

In North and South Dakota land was acquired on six Indian reservations.

Following the release of the report by the Comptroller General, entitled "Administration of Indian Lands by the Bureau of Indian Affairs," in 1957 I introduced S. 2446 in the 85th Congress authorizing the partition or sale of inherited interests in Indian allotted lands in South Dakota, to provide for an interim trust patent, and for other purposes. Subsequent legislation was proposed in following Congresses. Early in this session, I introduced S. 628.

Going back to the report of the Comptroller General, in 1957 I prepared a statement which is as true today as 4 years ago.

With the permission of the chairman, I request to have the statement inserted in the record following this testimony.

Last year, when I visited with the superintendent of the Sisseton Indian Reservation, one of the matters discussed was the problem of heirship interests under consideration before your committee today. The superintendent handed me a copy of the interests in two leases, No. 26357 and No. 26723, covering the 1961 rental this year and how the rental would have to be disbursed. Lease No. 26357 is for \$40. The maximum share is \$3.80 and the minimum is 3 cents. As I look at the list of names, it is noted that the \$3.80 maximum goes to an estate. When that estate is probated, the proportionate shares to the determined heirs will be broken up still further. On lease No. 26723, the total rental is \$150. The maximum interest is down for \$31.25, while the minimum interest is zero. Apparently these interests are so small that a determination could not be made. One heir's share of the \$150 is 1 cent, several 2 cents, with others 4, 6, and 7 cents. Altogether, 89 individuals have interests in varying degrees.

The cases I have cited are not unusual. On every reservation in South Dakota and elsewhere, the same holds true.

Your committee last December released the findings of the Indian heirship land survey. The compilation and statistics from the questionnaires to the Indian Bureau, the Solicitor's Office, and the Indian tribes gives ample evidence for the urgent need for authority to correct the problem.

INDIAN LANDS, INDIAN RIGHTS, AND THE STOCKGROWER

(By U.S. Senator Francis Case)

We have all heard of the \$64 question. And of a \$64,000 question. But not until I was reading a report by the Comptroller of the United States dealing with a land problem in South Dakota did I ever hear of a question divided into 54 trillion parts.

The report is entitled "Administration of Indian Lands by Bureau of Indian Affairs." The 54 trillion comes in as the lowest common denominator for the varying amounts of interest held by 99 heirs to a tract of 116 acres of land taken by the Army Engineers for Fort Randall Reservoir.

"Arrow Sticks in Him" (or Walking Many Arrows) was determined to have the right to 4 trillion, 199 billion, 168 million, 842 thousand, 4 hundred/54 trillionths of the 116 acres. The value of that interest was computed at \$585.67.

On the other hand, Francis Hairy Chin was determined to have only 2 billion, 887 million, 967 thousand, 628/54 trillionths of an interest worth exactly 37 cents.

Only one other Indian heir had as many 54 trillionths of interests as had Walking Many Arrows. Four other Indians had the 37-cent interest. Three had a 43-cent interest.

Some 90 other Indians had interests ranging from 64 cents to \$384—all expressed in numbers of the 54 trillionths of an interest. I have been using 54 trillion as a round number. Actually, the fractional interests were in terms of a 54,268,714,886,400th share of the 116 acres.

ONLY HALF SINGLY OWNED

The Comptroller General's report says that as of June 30, 1954, out of 103,774 Indian allotments, only one-half were held by single owners whereas 28,576 were held by from two to five owners and 20,480 were held by six or more owners.

At the Billings area office, one allotment of 160 acres was owned by 78 heirs, another by 73 heirs. Those figures were for February 1955.

In the 2 years that have elapsed—how many of those heirs have died and their interests passed on to others, with further fractionating of interests? Who knows?

The Comptroller General discovered:

1. Indian heirs ordinarily do not have the facilities or cash to settle estates.
2. No economic incentive exists for the Indians to simplify the status of heirship lands.
3. Indian family relationships are complicated. Marriage and divorce may follow tribal custom rather than State law.

COMPTROLLER RECOMMENDS ACTION

So, the Comptroller has now formally recommended that "Congress consider legislation to authorize the Secretary of the Interior to sell or partition inherited lands held under trust patent, without requiring the consent of all competent owners and without limiting that authority, as at the present time, to cases where one or more of the heirs is determined to be incompetent."

I think the Comptroller simply threw up his hands as the Army Engineers must have when they found that this mounting fractionating of interests required denominators of millionths, billionths, and trillionths to reach a common factor that could express the size of an heir's interest.

If that was the fix of the Comptroller General of the Army Engineers in making a settlement for lands acquired once and for all, what is, or has been, the plight of the stock grower who wanted to rent one of these tracts of land from Indian owners?

Or, of the Indian who finds himself with an interest in land that he cannot use, rent, or sell?

MANY COUNTIES ARE INVOLVED

In Roberts County, S. Dak., thousands of acres lie idle and produce weed seeds that wash down to fertile croplands because of the practical impossibility of fixing responsibility and ability to manage the land.

In other counties with Indian lands, the problem is similar. And that goes for a very large number of counties in South Dakota.

Fractionated heirship Indian lands tantalize the Indian owners and torment the stockman who tries to use them.

Leasing through the agency offices brings a round of bookwork, frayed tempers, and frustration.

And, when heirship interest can be determined, some Indians find themselves like the young returned soldier Sioux did in Denver, a few months back. He got a check for 7 cents as his share of a lease fee. It would cost him 10 cents to cash it.

How much it cost the Government to lease the land, determine the interests and mail the checks, you guess.

Senator CHURCH. Thank you very much, Senator, for coming.

Senator BURDICK. I would like to ask our colleague just one question.

I think your suggestion to handle these sales has a lot of merit. The only question that occurs to me is this:

Where you permit the tribe or individual Indian to meet the highest bid, is there any danger of any non-Indian bidding the property

up with the resulting artificial price having to be paid by a tribe of Indians?

Senator CASE. If it were an artificial price and neither the tribe nor some other member would get it, the bidder would be stuck with the bid, and the individual whose land was being sold would profit to the extent of the greater value. But the bid would at least have to be as high as the appraised value or higher.

Now I assume that if you had some tract, somebody might put an artificial bid on it, but there has to be an appraised value by Government appraisers, and if there were to be any bid placed above it, more than the true value of the land, the individual Indian, the allottee at least would get the benefit of it.

But I suppose that same thing could be said of every sale of land in the Bureau of Land Management, the land that it administers in the public domain. The same thing could be said there. There could be an artificial bid-up. I recognize that somebody might want to bid out of all reason, but those instances would be relatively few and far between. Punishment would rest upon those bidding more than it was worth. The benefit would go to the Indian, the Indian allottee.

Senator BURDICK. The benefit would go to the allottee who was selling it but not to the benefit of the Indian who was buying it.

Senator CASE. You mean the Indian who might want to buy it and had to pay too high a price in order to meet the high bid. It might put a high price on it for him, but unless you believe in complete socialization of the interest of land, if the Indian who has it for sale gets the benefit from it, it seems to me that that would offset the other.

Senator BURDICK. I don't believe in the socialization of the sale of land, but I was wondering if the Indian land presented any different problem than ordinary land.

Senator CASE. I don't know that it does. As a matter of fact, in my bill, which, as I said, was designed particularly for the South Dakota situation, it would propose that when 25 percent of the interest of land involved wanted permission for a partition of an estate, they could go to the competent court within the State and have the same rights that any other owner of land could do, and ask for a partition of the estate, which would result in the sale of the land. And the same objection or the same theoretical situation that you suggest for the partition of an Indian's estate could be brought up with respect to the partition of any estate in white ownership. It would be theoretically possible for somebody to go into a county court in South Dakota where an estate was being probated and bid up a piece of land far above the appraised value if he wanted to do so.

Senator BURDICK. Well, then, I can generalize by saying you don't think this abuse would take place.

Senator CASE. I don't think there would be any widespread abuse of it. I think it would carry its own compensation to the Indian who was the allottee, carry the same penalty against excessive bidding that exists in the normal probating of the case.

Senator BURDICK. Thank you.

As I said before, I think you have a very good suggestion.

Senator CASE. Thank you.

Senator CHURCH. Thank you very much, Senator Case.

I just want to comment here that I am informed by Mr. Gamble of our staff that with respect to one Indian tribe in the State of Washington, there is now operable a provision that permits Indian allottees to go into the State courts on a petition as others might do under the State law. The difficulty has been that it hasn't worked out, mainly because of the court costs involved. These have tended to discourage Indian allottees from taking this action. These court costs will run between \$500 and \$1,000. So we haven't found a solution in that instance through the use of this device.

I just put that in for purposes of the record, but it does not directly relate to the formula that the Senator suggested.

Senator CHURCH. Congressman Berry, we would be very pleased to hear from you.

STATEMENT OF HON. E. Y. BERRY, A U.S. REPRESENTATIVE IN CONGRESS FROM THE SECOND DISTRICT OF SOUTH DAKOTA

Mr. BERRY. I appreciate the opportunity of coming over here to testify. I appreciate the fact that this committee is giving its very serious consideration to this heirship problem. I might say that when I was out home for the 4th of July week an Indian from Pine Ridge Reservation came to me and handed me a check drawn on the U.S. Treasury. He endorsed it and said, "I want you to take this back to the Secretary of the Interior." He said, "I want it applied on the national debt."

The check was for 7 cents, and it cost him 10 cents to cash it. So the value was better off applying it on the national debt.

Senator CHURCH. I wonder what it cost the taxpayer in public administration to administer it.

Mr. BERRY. A great many hundreds of dollars, aside from the book-work. I mean the running of it through the various files and so forth in the area offices.

I will now proceed with my prepared statement.

Mr. Chairman and members of the committee, I am Congressman E. Y. Berry representing the Second District of South Dakota, and am appearing here to speak in behalf of S. 1392. I might qualify myself to speak on the subject by stating that not only do I represent many Indians in my district but that I have been a State's attorney, a county judge, and have in the past been chairman of the Subcommittee on Indian Affairs of the House Interior and Insular Affairs Committee.

Heirship land has been one of the most pressing problems in the field of Indian affairs for many years, to both the heirs themselves and the Federal Government. You are all, no doubt, familiar with how the problem came into existence, but perhaps wonder why something hasn't been done about it before this time. Basically, I might say that, in my opinion, there has been a complete lack of information concerning the extent of the problem, how the Indians feel about it, and what they want done about it.

Two years ago the chairman of my committee, Mr. Aspinall, directed the committee staff to contact the Indians directly concerned, these are the heirs themselves, and determine just how much of a problem it presented to them and what they felt should be done about it.

This was done on a truly grand scale. There were over 50,000 questionnaires mailed to the heirs themselves, not only asking them what they wanted done with these lands but also obtaining information concerning their economic status, employment, etc. There were over 9,000 heirs that answered the questionnaires, this is the equivalent of thousands of committee hearings. It certainly would have been impossible to hold hearings for so many witnesses. During the time our committee was studying the problem from this approach, your committee undertook a very extensive study based on the administrative problems, types of land concerned, and what the Government and tribal officials knew and thought about the problem. These two studies were finally published and represent 2 years of very fine work by both committees. I might say here that the reason these studies were undertaken was because the Department of the Interior could not provide the necessary information on which to base heirship legislation. With the culmination of these exhaustive studies, a bill was very carefully drafted that took into consideration all of the problem areas within the general area and the opinions expressed by the Indians themselves.

This bill was introduced here in the Senate by you, Mr. Chairman, and in the House by me. I feel it is a very sound product that will solve the heirship land problem as it should be solved, permanently. However, when the House and Senate bills were sent to the Interior Department we received, instead of a report, a suggested draft for another bill that bore little if any resemblance to ours. It is not based on any extensive analysis of the problem nor is documentation offered. It puts the Congress in a position of either accepting it on face value, without any opportunity to delve into the facts that brought it about or to reject it entirely. Conversely, Mr. Chairman, the bills you and I introduced were thoroughly documented and this documentation was printed for all to see. If our analysis of the materials and information collected was incorrect, the Department should point out to us precisely where we went off the track. Instead, Mr. Chairman, the Department report, as I recall, does not even mention the 2-year studies made by both the House and Senate.

We received, as you did on this side, a substitute draft of another bill that bears little if any resemblance to ours. The report on S. 1392 and H.R. 6569 evidently fell by the wayside somewhere within the Department. In addition, the bill presented is not based on any extensive analysis of the problem but a rather surface approach that the Department admits is only a "first step" in the right direction. To my way of thinking the time is now to take much more than a "first step" and I doubt if we will ever be more prepared.

I would like to briefly discuss the problem and the differences in approach by the Department and the Congress. The problem is that over 6 million acres of land are in fractionated ownership and there is another 6 million acres that soon will be. Many heirs reported to the House committee that the situation seemed utterly hopeless for them. The majority wanted the land sold, but I'm sure they had in mind money, which is what most of us think of when we consider selling something, and not some vague pieces of paper.

To my way of thinking there are four major areas that such legislation must cover: (1) It must provide a solution to the confused

ownership of such lands; (2) it must provide some solution to the problem of another 6 million acres that will become heirship land in the future; (3) it must provide an opportunity for the individual owners to purchase the entire tract if they are capable; and (4) it must provide, consistent with the Government's position as trustee, the maximum possible return to the trust beneficiaries, who are the heirs. Now, how does the administration bill attack the problem? Instead of providing a solution to the problem it confines itself not to the 6 million acres of heirship land that are now the problem, but to only about 8 percent of these lands that it defines as "unproductive." While it is difficult to understand why the Department concerns itself with only 8 percent of the problem, it is even more difficult to understand why the 8 percent of the heirship lands are unproductive. Your own report indicates that the Bureau of Indian Affairs field officials stated there were 471,000 acres of heirship land that are unproductive because the signatures of all heirs could not be obtained on the lease forms. Yet the Bureau of Indian Affairs reported to your committee at the same time (p. X, pt. 2) that these signatures were unnecessary since the Bureau has the authority to lease the lands anyway. Therefore, instead of worrying about these so-called unproductive lands the Department need only inform the Superintendents that the heirs' signatures are not necessary and to go ahead and lease the land.

However, be that as it may, the Department does not have any solution to the problem of the other 6 million acres now in single ownership that will become heirship land in the future. We cannot ignore this situation, it is a fact that it will become heirship land and double the present problem unless action is taken now.

S. 1392 provides more than one solution to this problem while the Department bill does not even mention it. The Department bill does not allow the Indian owner any right to buy out the tract of land for his own use, S. 1392 does. The Department bill does not provide any procedure to guarantee the heir the best price for his land, S. 1392 does. I might interject here that it is a known fact that in many cases the Bureau of Indian Affairs appraised fair market value is considerably below that price for which land has sold. The Department is asking for arbitrary power to take this Indian and non-Indian land without their consent, transfer it to the tribe without payment (other than scrip), and then allow the tribe to mortgage such land even though they do not own it. This must be a new interpretation of the powers of Government. Not only does the Department suggest the Congress take such arbitrary action against the individual Indian for whom we are trustee, but they have suddenly assumed jurisdiction over non-Indians and include them in these procedures. I maintain this raises a very complicated constitutional issue, and if this bill becomes law the courts may invalidate it and we will be without a solution to the heirship problem. S. 1392 is very carefully formulated to avoid the constitutional problems for both Indians and non-Indians.

I might state what the Congress has come up with is a solution to the heirship problem as opposed to a tribal land consolidation program proposed by the Department. If we are to consider a tribal land consolidation program, that is one thing, but the committee did not study that subject although it did study the heirship land problem. In S. 1392, cognizance is taken of the fact that the tribes may need

some of these lands and the opportunity of purchasing them is provided, including loan funds, if the tribe does not have the necessary funds. We have given the owners an option to sell to the tribe at the appraised fair market value if they feel it is just that, but if they feel this appraisal is unrealistic they can demand an auction. It seems to me that this avoids the possibility of this Government being flooded with law suits in the Court of Claims by dissatisfied Indians, whereas the Department bill would cultivate such a situation.

Mr. Chairman and members of the committee, I will not belabor you with details concerning the bills under consideration since I know you are familiar with them, but I will close with a brief résumé of the bill that the Department wants substituted for the very carefully drafted S. 1392. In the first place, the Department bill begins by telling the Congress what the Congress "found"—not what the Congress found in their extensive studies of 2 years' duration. In section 2, terms such as idle, economically unproductive, small, isolated, etc., are used to describe land that the Secretary will give to the tribe. The Secretary himself states on page 2 of his accompanying report that there is a confusing and difficult administrative problem due to various statutes concerning heirship land, and the Department bill is an attempt to cut through this confusion. Can the use of such terminology that cannot be precisely defined cut through any confusion or only further confuse it? Section 3 also provides the Secretary of the Interior authority to arbitrarily transfer a non-Indian's interest to the tribe without any question concerning the constitutional rights of the individual.

I wonder why then, the Department has held and still holds, to my knowledge, that they have no authority to lease or handle money from a nonrestricted interest and that they have no authority to probate a non-Indian's share in such land. How, then, can the Department arrive at the conclusion they can legally transfer his interest to the tribe without his consent? Again in section 3 the Department states that the consideration may be paid in installments and it may be evidenced by interest-bearing certificates. This section goes on to say that there may be a minimum annual payment prescribed by the Secretary. I submit that when we take action concerning heirship land the bill should be drafted so that the Congress and the heirs concerned know exactly what authority the Secretary of the Interior has. This section is so full of "may" and "discretion" that I am not sure where the limits of authority requested really are. The last part of section 3 is indeed a new approach. After having his land taken away by the Federal Government and having it turned over to the tribe without a cash payment, he (the heir) may or may not receive some sort of paper comparable to an I O U. But now comes his problem: the tribe can mortgage his land that they have not paid him for. And in this case the Department's bill states that in the event of foreclosure the Federal Government shall be divested of title to the lands. Nowhere in this section is the owner mentioned; he has suddenly ceased to be a party to the action where his land is being foreclosed for nonpayment of a mortgage that he had nothing to do with. As an aside, I wonder what commercial lending institution would accept such a land title for mortgage purposes?

Section 5 is another that makes the tribe the trust beneficiary instead of the heir who owns the land. For example, certain rather vague requirements are set up that must be met to partition or sell the land. Then the teeth are pulled by the sentence that states "except that prior to a competitive sale the tribe shall have a preferred right to purchase at the appraised value any lands * * *." Obviously many heirs will be afraid to ask for sale of the land since the tribe would step in and buy it for a low appraised price.

Section 6 provides a system whereby a non-Indian holding an interest can with the permission of the Secretary take his case to the State courts. Why the Department thinks the State courts will consider partitionment of trust lands, I don't know. I might read to you this statement from an heir printed in the House study on the subject: "After his death [the White Father] the State court will not handle the probate because the land was in trust and the Government refused to probate it because a white man owned it. We cannot find the court that can handle this." The Department carefully states in this section, however, that for the purpose of such action the Indian owners shall be "regarded" as vested with an unrestricted fee simple title but yet goes on to say that any title acquired in the proceedings by an Indian tribe or Indian may be taken in trust. I am sure the State courts will see through this "momentary fee patent" that the Department has in mind and will refuse to consider such cases.

In summing up, I can only say that in my opinion no tribe in the United States is so desperate for land that we, as trustees for these individuals owning heirship land, should consider such an arbitrary vehicle to obtain lands for the tribes. I also submit that an individual Indian cannot be taught respect for his Government or his tribe if they are a party to such action. In my opinion S. 1392 would be lasting, effective, constitutional, and workable whereas the Department's bill is a rather ineffectual vehicle that at best could not keep the current balance between heirship land and other land coming into that category.

Senator CHURCH. Thank you, Congressman.

Mr. Carver, Senator Allott says that he has two or three more questions he would like to put to you and your associates if you would come back to the table.

Will you also have some questions, Senator Burdick?

Senator BURDICK. Yes.

Senator CHURCH. Senator Burdick will have some questions. And I will defer my questions until this afternoon if it will be convenient for you gentlemen to come back at 2 o'clock.

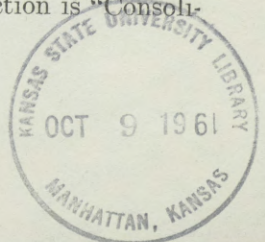
Mr. CARVER. Yes, sir.

Senator BURDICK. I can, too, Senator.

Senator CHURCH. All right. Then let us let Senator Allott finish with his questions this morning, and then we will adjourn the hearing until 2 o'clock this afternoon.

Senator ALLOTT. Thank you, Mr. Chairman and Mr. Secretary.

I just wanted to call attention to two matters. In section 3 of your proposed bill there are two items which appear to be inconsistent with good law, I think. The title of this section is "Consolidation of Unproductive Tracts."



Now, the title of the section, I think, is a little misleading because the description or identification of unproductive tracts are those which are unproductive only because of fractionation of ownership interest or because tracts are so small or so isolated that their economic use is impeded. So I just wanted to call attention to the fact that this section called unproductive tracts is strictly limited and the naming of the section in the ordinary sense or use of the word "unproductive" is a misnomer here.

Would you agree to that?

STATEMENT OF JOHN A. CARVER, JR.—Resumed

Mr. CARVER. Yes, sir.

Senator ALLOTT. At least in the dictionary sense of the word.

Mr. CARVER. Yes, sir.

Senator ALLOTT. Then under this narrow restriction of this definition which you have here in section 3, in this section, only the tribe, and with its consent, could buy the tract.

Mr. CARVER. Yes, sir; that is right.

Senator ALLOTT. What would happen to the rights of non-Indian owners in this sense? You would preclude them from the situation entirely?

Mr. CARVER. Well, there are other provisions.

Senator ALLOTT. I mean under the unproductive tracts.

Mr. CARVER. Their interests would be sold along with the Indian interest.

Senator ALLOTT. But without any voice whatever?

Mr. CARVER. Yes, sir; I think that is correct. There would be the procedures which are provided in the bill.

Senator ALLOTT. Yes; but without any voice because the so-called unproductive tract is limited by your definition—"would sell the interest of non-Indian owners as well as Indian owners." They could be sold only to the tribe with the consent of the tribe, and no one else could bid upon them, and thus protect their own interests—and at the appraised value.

Mr. CARVER. Yes, sir. We didn't—

Senator ALLOTT.. I didn't want to raise the question of appraised value again because we have gone over this pretty well.

Mr. CARVER. The point which I made originally, I would repeat, is that by definition here is land standing idle; here is land for which there is no return, and no hope of return, and no hope short of congressional action of some kind for getting it out of this status.

Senator ALLOTT. Then on page 5 of your bill, as attached to the report of the Department, is section 5, subsection (b). This is the area which gives the tribe a preferred right subject to other questions which have been raised previously. So that it is only under section 5 that others might exercise their right to bid after the tribe has received the preferred right.

Mr. CARVER. But the preferred right, as section 5(b) states, is limited to those lands within the boundaries of, or immediately adjacent to, the reservation.

Senator ALLOTT. Maybe we ought to read that whole thing, that whole section (b) :

A sale shall be on the basis of competitive bids except that prior to a competitive sale the tribe shall have a preferred right to purchase at the appraised value any land offered for sale located within the boundaries of or immediately adjacent to its reservation.

I simply wanted before you left the stand this morning to point out the difference between the handling of these two different types of land, and I don't want to rehash all of the other material with respect to fair market value, obligations of the trustee, and so forth, that we went over this morning.

That is all I wanted to bring up at this time, Mr. Chairman.

Senator CHURCH. Thank you very much, Senator.

I think, then, that the hearing will be adjourned until 2 o'clock this afternoon.

Before we leave I want to call attention to the fact that Mr. Philleo Nash, our new Commissioner-designate of the Indian Bureau, is here, and we appreciate your interest, Mr. Commissioner. Thank you for coming this morning.

Mr. NASH. Thank you, Mr. Chairman.

Mr. CARVER. Let me, if I could add one more word to the answer I just gave to Senator Allott, let me just say—I would just like the record to show that under section 7 we provided that the Secretary shall give actual or constructive notice of any action proposed to be taken under sections 3, 4, and 5, and shall provide an opportunity for any parties in interest to submit written or oral objection to the proposed action.

Senator ALLOTT. Yes, but this is true, but—

Senator CHURCH. He can holler, in other words.

Senator ALLOTT. He can holler, but you don't provide any basis upon which he can holler.

Mr. CARVER. I think that may be right, sir.

Senator ALLOTT. Thank you.

Senator CHURCH. We will adjourn until 2 o'clock this afternoon.

(Whereupon, at 12:15 p.m., the committee recessed, to reconvene at 2 p.m., this same day.)

AFTERNOON SESSION

Senator CHURCH. Mr. Carver, you may resume your place on the stand with your colleagues.

Let us get back to your first statement, John. I think that both the Department and the committee are seeking the same objective, and that is to make more productive use of the heirship lands for the benefit of the Indian people. I think we both recognize the extent of the problem and how long it has gone unsolved. And the question that I would raise with you is whether the proposal you make in the form of a substitute to the bill under consideration will get the job done.

Now, as I understand it, you have divided these heirship lands into two parts—those that are presently in unproductive status, that is, unused heirship lands, and those that are in productive status. And

the best information that the committee has would indicate that about 8 percent of all heirship lands are presently unused.

Now, is that figure roughly accurate, so far as you know?

**STATEMENT OF HON. JOHN A. CARVER, ACCOMPANIED BY
MARTIN P. MANGAN AND LEWIS A. SIGLER—Resumed**

Mr. CARVER. I am sure it is, Senator. I think there is no question about the relative sizes. It could vary one way or the other.

Senator CHURCH. Yes. In any case, we would probably be safe in assuming that something less than 10 percent of the total heirship lands are presently being put to no productive use whatever.

Well, the question arises: Why?

I will let you answer it. I was about to suggest what seemed to me to be the answer to my own question, but that is not the exercise here; the exercise is for me to ask the questions and for your to provide the answers.

Why is 10 percent of this heirship land presently unused?

Mr. CARVER. Of course, the answers to that question were elicited by the staff of your own committee in the questionnaires which were sent out. A part of the problem, possibly a minor part—I do not know—but a part of the problem has to do with the very fractionation, that is, the physical proportions of the number of heirs and the fact that, under diminishing returns, which was so amply testified to by Congressman Berry this morning, we finally get to the point where people have an utter disinterest. Their interest in it is so small that they cannot be bothered. The interest they may have might not justify responding and saying they are not interested.

Senator CHURCH. Well, that would be understandable where the owners themselves are concerned. That is to say, it is easily understandable that owners who hold a very small interest in the land would not be sufficiently motivated to see to it that the land was put to productive use.

But the land is all trust land, it is not, and under the general jurisdiction and control of the Secretary of the Interior and the Indian Bureau?

Mr. CARVER. The land that we are talking about in this case is indeed all trust land.

Senator CHURCH. So the actual management of the land is within the province of the Secretary. He could lease it, could he not?

Mr. CARVER. No. Under the present law, he must get consent of all of the owners.

Senator CHURCH. No, that is not my understanding. My understanding is that, with a 90-day notice, he can lease trust land without the consent of any of the owners.

Mr. CARVER. Well, there are procedures whereby this management power can be exercised.

I am not personally familiar with the management details, but the Bureau tells me that the administrative difficulties of it under the present law precludes its effective management in many, many instances.

Senator CHURCH. We have had this question before the committee before, and I think it has been pretty clearly established from our

testimony that the Secretary does have the right to lease these lands without the need for obtaining the consent of the owners, subject to a procedure that is set up under the law which involved 90-day notice.

Now, one of your associates there might be able to respond to that. If I have made an accurate statement of the law, I think we ought to have it in the record.

Mr. SIGLER. Mr. Chairman, your statement is accurate, but not complete. The law you are referring to is a law passed in 1940, and it does permit the Secretary to lease lands in an heirship status if there is a failure to agree among the heirs for a period of 90 days, and there are a couple of other conditions.

But Mr. Carver's statement is accurate. Although that authority exists, it is not an adequate authority for the Department to get all of these lands under lease. And that is the reason for our request in this substitute bill for broader leasing authority.

Senator CHURCH. Well, I am just wondering whether it is a question of an inadequacy in the law or whether it is a question of unwillingness to administer these lands under existing authority in the law. It seems to me that we are really quibbling. I have the law before me now and, with the consent of the subcommittee, I would like to incorporate the pertinent provision at this point in the record.

(The provision of law referred to is as follows:)

ACT OF JULY 8, 1940 (54 STAT. 745, CH. 554; 25 U.S.C. 380)—LEASES OF INHERITED ALLOTMENTS BY SUPERINTENDENT

Restricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined and (2) when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe. The proceeds derived from such leases shall be credited to the estates or other accounts of the individuals entitled thereto in accordance with their respective interests.

Senator CHURCH. It seems to me that the law is sufficient to permit the leasing to take place if there were a real determination to put these lands into use. Listen to the provision:

In the act of July 8, 1940, the Congress granted authority for the superintendents of the various reservations to lease restricted allotments when the heirs and devisees have been determined and when such land was not in use by any of the heirs, in those cases where the heirs were not able to agree on a lease within a 3-month period by reason of their number, their absence from the reservation, or for any other cause.

Now, as I read that, we are talking now about the unused lands, and it seems to me that the present law is perfectly adequate if there were a determination to use it, subject only to the fact that you have the 90-day-notice provision, that that might delay the leasing for that period of time. Yet it is obvious that this law is not being used in many cases.

Mr. CARVER. Well, let me throw in one other factor which seems to me to be worthy of note.

The Department has to make a decision under this law with reference to each tract. In other words, that is the way the authority is written.

Now, the interest of the Department is an interest in the welfare of the individual Indians, together with the tribal group that is there.

Now, the problem in this law is that, in the first place, we have uneconomic units, as I said this morning.

Senator CHURCH. Why can you not take those units; why cannot the Administrator right now, under the provisions of this law if it were applied imaginatively, why could he not take a bunch of these units, put them together, and offer them under one lease?

Mr. CARVER. They may not be contiguous, and they may also—

Senator CHURCH. Of course, in those cases where you have a package of contiguous parcels of heirship land I would not think that the present law would limit the Secretary to leasing each individual parcel separately. I should think that he could package them together, under the present law, and offer a lease in an economic and a sufficiently large unit to be economically feasible, after the 90-day period, and put this land to use.

In other words, where is the deficiency in the law that results in leaving so much of this land unused? It seems to me that the leasing authority is here and it is not being properly utilized.

Mr. CARVER. Well, you have to judge each case on its own facts.

Some of the lands and some of the reservation situations involve grazing lands where I think that may be possible, and indeed in some of the situations I think we are doing precisely that, using this leasing authority. In other situations the pattern of the ownership and the size of the tract is such that administratively it just is not feasible to block them into a unit, considering the use to which that particular land may be best suited.

Senator CHURCH. Then what could a tribe do?

Mr. CARVER. Well, the—

Senator CHURCH. If the Secretary now finds the land in such state that it is not feasible to lease to productive use, what attraction would there be to the tribe to acquire it?

Mr. CARVER. Well, since it would be easier for the tribe to acquire it under these procedures, it is more simple than it is for the Department to acquire it from the individuals, and since when the tribe gets it it can put it to the tribal use, whereas the Department has no alternative save to go through a distribution of this money individually every time there is a lease payment—

Senator CHURCH. But it is not a question of what we do with the proceeds from the public lease. The question is: Here is land that is not being leased, and you have suggested that one of the reasons is that the land is slivered up into little parcels that make it unleaseable. Now, if it is unleaseable for the Secretary, I would think that it is going to be of very questionable value to the tribe.

Mr. CARVER. Well, taking the situation on its logical four corners, you are right. I can only fall back upon the fact that by making it a simpler proposition, and by moving this thing in the direction of a transfer to the tribe, we accomplish two things that the leasing does not accomplish. The first one I mentioned this morning—to go ahead and to lease the property; just to get it into production allows the

heirship cycle to continue. And, therefore, every time there is a probate we have to have a reevaluation of the whole thing, and that takes so long.

Senator CHURCH. Yes, but we are talking about unused land now. And I think we have established that the present law confers upon the Secretary the authority to lease the land. He is not now using that authority. And the only reasons I can think of why he is not using the authority would fall into three categories:

(1) Poor administration under the law; poor land management, which is entirely possible.

(2) That the tracts of land are simply unleaseable by virtue of their location or their size or what have you, in which case the problem faced now by the Secretary would not be very different from the problem faced by the tribe. And, therefore, I can see precious little inducement for the tribe to take these lands.

(3) The third category, which I think would account for the biggest part of these unused lands, is simply that the land is no good. I can see wasteland involved that has no value to anybody, and, therefore, it lies idle.

And again the question arises: Why would the tribe want it? Why would they want to acquire it under the procedures you have set out in this bill under that situation?

Mr. CARVER. Well, the answer to that, Mr. Chairman, is very simple. It does not provide that the tribe has to.

Senator CHURCH. I know it. And I think you will find upon analyzing this thing that the device that has been set up will be largely left unused.

Mr. CARVER. It may be.

Senator CHURCH. Because there will be very little inducement in any situation that I now can perceive for the tribe to acquire these lands from the allottees.

Mr. CARVER. Well, it may be that some of the tribes and the representatives of the tribes with personal knowledge of the situation can bring to the committee some personal facts on it. I personally do not know.

I do know that the Department does lease lands under these circumstances in very many situations. We do utilize the authority which is there. And there is no unwillingness to use the authority which we have.

And you are quite right when you state that some of the land may be of no economic value. But whether the land is the finest farmland in Colorado or Idaho or North Dakota, or whether it is absolutely barren wasteland, our land records and all of our administrative supervision must follow the same pattern. And we must stop this fractionation process. And utilizing the leasing procedure, even though it may bring it into production, does not have anything to do with stopping the fractionation.

Senator CHURCH. I agree with you.

The only point that I am trying to make is that I think that the device that you have proposed for unused heirship lands is not going to prove workable. I do not think it is going to result in the acquisition of these lands by these Indian tribes in any significant amounts.

Mr. CARVER. It may well be, Senator.

Senator CHURCH. And, therefore, I cannot regard it as the solution that we need to find.

Now let us go to the second aspect of the proposal, and that deals with the heirship lands that are presently in productive use. And it is with these, of course, that we have the administrative problems, because these are the ones that involve distribution of proceeds and fractional amounts to large numbers of owners and very high administrative costs.

Now, with respect to these—and they would constitute at least 90 and perhaps 92 percent of the total heirship lands, you are providing the following solution. You say:

"Our draft bill provides for an administrative partition in kind or sale upon the application of Indians who own a majority interest."

All right. Now, with respect to 90 or 92 percent of this land, where we really do have the administrative problem and the high administrative cost, you cannot even begin to get a solution under your proposal unless a majority of the allottees agree.

Mr. CARVER. That is correct, Mr. Chairman.

Senator CHURCH. Well, based upon the experience we have had to date and very extensive studies of both committees, we can only conclude that this would not work. It has not worked. We have at least three instances based upon this need to obtain a majority of the allottees before any procedure can be initiated, and it has not worked in those cases. Why should we now believe that the same formula by some magical disposition is going to work in the future?

Mr. CARVER. Well, the principle which we relied upon in this instance is that the group of Indians affected, collectively, should have some kind of a democratic approach to it, some kind of majority view on it.

Now, you may be right. It may be the wrong number. As Senator Anderson pointed out this morning, in another bill which will be considered by this committee next week, we have agreed with the tribe that the appropriate number is 25 percent. Is that correct?

Mr. Sigler tells me that in certain cases it is 25 percent and in other cases it is 50 percent.

The general philosophy of getting more than half is the one that has guided us. The opposition idea, which is that any single tenant in common should petition for it we think is pretty drastic in the other direction.

Senator CHURCH. Well, then I would think that the course of wisdom based on previous experience would be to discard that which we know will not work, which, I submit, is the formula you have presented, and find a middle ground between the two extremes that offers us some promise.

Mr. CARVER. That may well be, Senator. We have come up with a basic idea here, but the Congress sets the policy on this matter. We are well aware of that fact. And we oppose, we quite strongly oppose, the idea of a single owner having the right to trigger, so to speak, this whole procedure.

Senator CHURCH. Can you say, on the basis of the experience of the Department, that the 25-percent formula, where it has been adopted, has worked?

Mr. SIGLER. Mr. Chairman, may I suggest that the experience of the Department under the present laws is not enough; we do not have enough experience to come to a reasoned conclusion. The laws that you are referring to, the first one was one mentioned this morning, permitted the Tulalip Indians to go into the State courts. That law was based upon a very special set of circumstances that related to the desire of an oil company to acquire the land for construction of a refining plant.

The other cases you mentioned refer to reservations on this Missouri River flood control program. Two of the reservations are involved in the bills coming before you on Tuesday—Lower Brule and Crow Creek. Those same two reservations were involved in another dam called Fort Randall, and in that legislation you provided the authority to sell heirship lands on the basis of—my recollection is 50 percent. I am not sure whether it is 50 or a combination of 25 and 50. But the opportunity to use that law just has not presented itself. Or maybe I should say we have not pursued the authority very vigorously, because the problem has been one of disposing of those lands to the Corps of Engineers for the construction of the project, and the land consolidation programs contemplated under that reservation have just not yet been undertaken.

So we really do not have an adequate experience on the basis of which you could conclude that the present law does not work. I think we need more time to decide whether it will work.

Senator CHURCH. You cannot present us with any evidence that it has, however?

Mr. SIGLER. No. The program is just getting started, so we have no experience yet.

Senator CHURCH. All right. If you obtain, under the proposed formula, 50 percent of the interest; or that is, the consent of individual Indian allottees who own a majority of the interest in the allotment, then the only thing that they may do under your proposal is to sell the land to the tribe for an appraised value, is that correct?

Mr. CARVER. Well, the tribe has a preferential right, but that is not the only alternative. Other disposition of it is authorized.

Senator CHURCH. Such as?

Mr. CARVER. Including competitive bidding, for one; purchase by outsiders; by other Indians.

Senator CHURCH. Well, but the land may not be sold for less than the appraised price; is that correct?

Mr. CARVER. Well, we provided that the sale is to be on the basis of competitive—yes, you are quite right. It may not be sold for less than the appraised value.

Senator CHURCH. And the tribe is entitled to buy it at the appraised value?

Mr. CARVER. Yes, sir, that is what we provided.

Senator CHURCH. Could the tribe then turn around and resell it at a higher value?

Mr. CARVER. Yes, sir; subject, of course, to any restrictions in its—

I am incorrect on that. The tribe may not sell this land. The tribe does not have the authority to speculate with it.

Senator CHURCH. The tribe cannot turn around and sell it?

Mr. CARVER. That is correct, yes, sir. I am sorry.

Senator CHURCH. There is some question raised here by Mr. Gamble on the staff as to whether that is a correct statement on the bill.

Mr. SIGLER. That is the correct statement.

Senator CHURCH. The tribe may not sell tribal property without consent of the Secretary?

Mr. SIGLER. Without legislation. I think Mr. Gamble——

Senator CHURCH. Is legislation required?

Mr. SIGLER. Yes. I think Mr. Gamble may be referring to a provision that permits the land to be mortgaged by the tribe, and if there should be a mortgage foreclosure, of course that would be a form of sale. But other than a mortgage foreclosure, there is no authority in the bill for the tribe to sell land. And in the absence of statutory authority, the tribe may not sell any of this land.

Senator CHURCH. What does this language mean that I am reading? This is section 3(c) of your proposal, which reads as follows:

Such certificates shall provide for their redemption on a preferred basis out of any income realized from such lands through cultivation, sale, or otherwise.

Mr. SIGLER. Well, that is what I was just referring to, Mr. Chairman. That is not an authority to sell; it is a statement of what shall be done with the proceeds of land if it is sold under some other authority. The only other authority to sell the land is by a mortgage foreclosure; that is, this bill in another place authorizes the land to be mortgaged. And if there is a mortgage and a mortgage foreclosure sale, the proceeds of that sale would be used as you read in subsection (c).

Senator CHURCH. Fine. I think that clears the matter up.

Senator ALLOTT. Would you yield at that point, Mr. Chairman?

Senator CHURCH. Yes, surely.

Senator ALLOTT. The GAO points this out specifically, when it says in its report—and they have not had a chance to give it yet; but section 3(c) of the Department's proposed bill "provides for redemption of certificates on a preferred basis out of any income realized from conveyed lands through cultivation, sale, or otherwise. We are aware of no general authority available to tribes to sell land, and no such authority is specifically stated in this bill. If the intent is to give the tribes such authority, we believe that the authority should be specifically stated, rather than implied from the wording of the subsection or the wording in the first paragraph of this section, which would permit the tribe to take title in an unrestricted status under certain conditions."

Now, I would like to ask this, because I want to get this cleared up in my own mind, if you will, Mr. Chairman.

Under 3(c) in the bill—or not 3(c), but under section 3, where you say the tribe shall be the only persons who shall have a right to buy; would they take this in a trust status?

Mr. SIGLER. Yes, they would.

Senator ALLOTT. So that they would be in the same status as any other trust lands now, and they could only sell with the consent of the Secretary?

Mr. SIGLER. Consent of Congress.

Senator ALLOTT. Consent of Congress.

Mr. SIGLER. Yes. Senator Allott, the statement you read from the GAO report, which I have not seen, is consistent with what I just said. This bill does not confer sale authority except in the mortgage foreclosure case, and it was not our intention to grant such authority.

Senator ALLOTT. Well, then the question comes up, if the only way that this could occur under 3(c) is not by a sale but by an involuntary conveyance—a foreclosure is not a sale, it is an involuntary conveyance—if that is so, why do you not say specifically in 3(c) that this shall take effect only in the case of an involuntary conveyance by means of mortgage?

Mr. CARVER. We can do that.

Senator ALLOTT. So that your purpose would be absolutely clear.

Mr. SIGLER. That would be a clarification, I think, which would be desirable.

Senator ALLOTT. Well, you have straightened it out with me, and I agree that the statement you made, Mr. Sigler, is fully consistent with the statement made by GAO. But they have pointed out the questions that it raises.

Mr. SIGLER. Surely.

Senator ALLOTT. Thank you, Mr. Chairman.

Senator CHURCH. Surely.

Well, now let us go back again to our situation. We are talking now about land in productive use as to which the Indian allottees, the present beneficial owners, have agreed; that is, who hold a majority interest in the land, want to dispose of it.

Senator ALLOTT. Mr. Chairman, I think we are getting the record confused here. We have been talking about section 3, which is non-productive.

Senator CHURCH. Well, I have moved on in my questions to the productive matter.

Senator ALLOTT. Oh, yes.

Senator CHURCH. We had covered the unproductive land beforehand.

With respect to the productive land, you propose that where the Indian owners who have a majority interest in the land want to dispose of it—one; and the Secretary approves of the disposing, then it may be put up for sale, but the tribe has a preferred right to purchase the land at its appraised value.

Now, do you not think that if you were in the position of these Indian allottees, having the beneficial interest in the land, that you would hesitate to dispose of it if you knew that the tribe could acquire it at the appraised value and you would have no opportunity to sell it for a higher amount if there were people in the market, other Indians perhaps, or anyone else who wanted to bid a higher amount?

This clamps a ceiling down upon the sale and would, it seems to me, tend to undermine the inducement to these Indian owners to dispose of the property under those conditions.

Mr. CARVER. Well, that may be, Senator Church. But I would add this one other factor which I think Congress ought to consider. That is, that the allottee in most of the situations would be a member of the tribe. And as a member of the tribe, as one who participates in any general economic improvement of the situation of the tribe it would

be to his interest to see that there was some kind of a ceiling, not only as to land which he might have one part ownership in, but generally. We would at least have an argument or a contention to make to the tribal members that the preference right, which puts the ceiling on only if the tribe gets it, gives it to an organization of which he is a member and participates in the benefits.

Senator CHURCH. Well, that is a good philosophical argument, and there is lots of altruism in it, but my experience with landowners has been that when they want to sell their land, they want to sell it for as much as they think the market will bring. And that is the way I know non-Indians function, and I think that is very likely to be the way Indians function too.

And we are trying to solve the heirship problem. And here you come with a proposal that can only operate as an inducement against alienation. Even where you have the majority who want to alienate, even where you have the Secretary approving it as being in the best interests of the Indians, then you come in and say the tribe has a preferred right to acquire it at an appraised value which is going to eliminate 90 percent of the inducement of the sale.

Mr. CARVER. Well, you raise a point, Senator, which seems to me overlooked. When you are talking about the appraised value, talking about the fair market value, you are not talking about some assessed valuation. And at least in theory, the discrepancy between the appraised value and what anybody would be willing to bid for it should be very slight. Certainly if there was a big clamor for this land, any fair-minded appraiser—and that includes Government appraisers—would recognize this as a factor in value.

Senator CHURCH. Well, now, let me quote from the report on H.R. 1150 that your Indian Bureau recently sent up relating to this very question. And I quote from the language of the report:

A recent experience is illustrative. In an advertised sale, the high sealed bid was considerably higher than the appraised price, and there was a big difference between the high bid and the second high bid.

I think that that statement is probably accurate, that with considerable frequency in a procedure that permits bids to be made on land, that the bidding will exceed the appraised price. In fact, normally in the law we say you shall not sell for less than the appraised price in order to make certain that the owners get at least that value. And we do that fully recognizing that in ordinary procedures the bid price may exceed the appraised price.

And here you come in with a proposal that says the tribe has a right to acquire it at the appraised price, and you say this will be an inducement to the allottees to sell. I think that commonsense says it would not.

Mr. CARVER. Well, I would not argue with the chairman on that at all. I would only say that, again, I will give you the motivation for the Department's view. There may be other approaches on it that this committee would choose to take.

But in a general way, we feel that there is a policy which supports protection of the tribe against abnormal pressures on pricing of this kind. And maybe we could handle the thing by saying that, if the auction price, so to speak, or the bid price should exceed the appraised

price by such and such an amount, that the Secretary might start over and get another appraisal. But we do think that there ought to be a preference for the tribe.

Now, if we can get an agreement on that principle, and not the naked principle that there is a kind of a vested right in somebody other than the tribe to acquire the property, we would have no quarrel with the committee at all.

I would add one other factor in here to equate this matter with some of the examples which have been given.

This committee itself provided that one of the covenants in the sale of timber had to be a sustained yield, in another bill. There had to be a "sustained yield" covenant in it. Well, anyone knows that the requirement of a sustained-yield covenant or any other kind of a covenant would push the price down. But no one here felt that there was such a vested interest in getting the maximum immediate price, that that ought to be taken out, that they ought to get whatever the top dollar would be.

Senator CHURCH. Mr. Carver, we have got a monster here, and he is bound down. He is bound and tied and gagged. And we are trying to get him untied. That is the purpose of this whole exercise.

Mr. CARVER. That is correct.

Senator CHURCH. And the proposals you are making for the purpose of untying this monster and releasing him seem to me really to only throw a few more ropes around him.

Mr. CARVER. Well, that certainly is not our intention.

Senator CHURCH. I am sure that is not your purpose. But as I analyze this, I cannot see how it is really helping to get the problem solved. In fact, I can just see the added troubles, added difficulties, to an effective utilization of these lands and clearing out these fractionated interests.

Now, in the exercise of his trust responsibility, does not the Secretary have to consider the interests of the beneficial owners?

Mr. CARVER. Yes, sir.

Senator CHURCH. The allottees?

Mr. CARVER. Yes, he does.

Senator CHURCH. In fact, he is the trustee for them, is he not?

Mr. CARVER. Yes, sir; he is.

Senator CHURCH. And it is not in their interest where a majority of them ought to alienate the land, and he thinks this would be in the best interests of the Indians to get the best price? Remember, we have got those two conditions already written in. The majority want it. That is the democratic principle. The Secretary supervises the thing and determines that it is in the interests of the Indians to do it. That in the trust principle.

Then does it not follow that he ought to sell it in such a way as to return a maximum amount to the allottees, the beneficial owners; is that not a part of his trust responsibility?

Mr. CARVER. Well, I would say, Senator, that the fallacy there—that that would be a fallacy only if you equated these values just in terms of the immediate dollar.

Now, it is a principle of this administration that there has got to be a land base. The Indians without their land, in all of the situations where we are dealing with Indians, have no way really to progress.

And it has not been enough just to cut them off from their land base and say: "Well, now, you are no longer Indians." That does not work.

Senator CHURCH. We have already cleared up that question. We are not dealing in here with the tribal land base.

Mr. CARVER. I appreciate that. But nevertheless, it is a capital asset of people of Indian blood that we have got here.

Senator CHURCH. Right.

And I recognize the need for giving every reasonable protection to the Indian people and of the tribes in the matter of retaining their land ownership. But the land ownership is a terrible mess, so much so that the living standards of these Indians is and continues to be unduly depressed.

Mr. CARVER. That is correct.

Senator CHURCH. Therefore, we are trying to come to a solution that will bring an end to the problem. And I submit that, based upon the questions I have asked and the answers I have received, I find little evidence to suggest that this will do it.

Now, let us continue with the example where the majority want to dispose of the land. We have got the Secretary saying that it is in their best interests, and we have the third provision; and if you can only get these three provisions all to work out in a given case, I will agree with you. The third provision is that the Indian tribe can move in and take it at the appraised value and the majority are willing to sell on that basis; so you do. And then some of the minority owners who did not consent to this feel that they have been gypped, that the land was disposed of for less than its value, that the appraised price was not commensurate with its actual value, and that they have a guarantee under the Constitution that their interest in land may not be taken from them without just compensation, and so they take it to the courts. I think they can do that.

And I think you open up a whole Pandora's box of litigation and also private bills of every kind for relief. And as sure as I am sitting here, you know and I know that the last thing we need in the management of Indian affairs is more litigation. We have Indians with claims, and they do not know how many years they are going to have to wait to get these claims litigated, such is the backlog.

What we need is a clean-cut legislative solution that will avoid this massive litigation.

Now, am I wrong in my assumption that those Indian allottees with minority interests who feel that they have not received just value and who have not consented to the sale are without remedy, constitutionally, in the courts?

Mr. CARVER. I think you are wrong in that, because I think that in case after case, the procedure for an appraisal of the kind which we have in here will fully protect the Government against any suit of the kind you are mentioning.

Senator CHURCH. Well, I have not studied out the question, and I want, of course, to know the views of the Justice Department. My limited knowledge of constitutional law has led me to assume that the guarantee in the fifth amendment is that property may not be taken without just compensation.

And I do not know; perhaps the courts have decided that just compensation is satisfied under the constitutional guarantee where a forced

sale is made on an appraised value. This is a forced sale so far as the minorities are concerned. The nonconsenting beneficial owners have had this property taken from them.

Now, if the precedents show that the constitutional guarantee is satisfied when the procedures call for only appraised value, then perhaps we have no constitutional question upon which claims can be asserted. If the precedents do not show this, then I submit we do.

Mr. CARVER. Well, before Mr. Sigler comments on that from the legal aspect, let me just say that so far as an action against the United States, which is the frame of reference in my answer, I think it would take further action or some action by the Congress to open this sort of thing up in this trust situation that we have here.

But I think Mr. Sigler has comments on this.

Mr. SIGLER. Mr. Chairman, let me answer your question in this way. It is impossible to keep anybody from going into court and claiming that his property was taken without adequate compensation.

So I would answer you flatly that there is a possibility that the individual member you mentioned would or could go into court claiming that a sale at an appraised value did not give him just compensation in the constitutional sense. There is no way of stopping that. You could not stop it if it were sold on a competitive-bid basis. He could say the competitive bids were rigged or—

Senator CHURCH. Yes, but that is not the situation. Of course, we all know any man can go into court who thinks he has been denied his constitutional rights and have the matter tested.

Now, what we are talking about is whether a forced sale at an appraised bid price will, under the precedents, afford a plaintiff reasonable prospect of recovering and give him a legitimate grounds for suit.

Mr. SIGLER. Well, that was to be the second half of my answer.

If such an individual goes to court, he will establish the value of the land—or the court will establish—by the appraisal process; so that it is not unusual, and I see nothing frightening, about selling the land in the first instance on the basis of an appraisal, with the full knowledge that, if that appraisal is disputed, the owner can go to court and seek another appraisal. And you cannot stop that.

Senator CHURCH. Well, I see a big difference in two methods of procedure. Wherever you are selling on the basis of bids, free bids on an open competitive market, and the price goes to the high bidder—I am not talking about Indian affairs; I am just talking about the normal sale of property—it is pretty difficult, barring fraud, for anyone to contend that the property has been sold at a lesser value than it did in fact have, because the very process of the sale establishes the fact that it was sold to the highest bidder under those circumstances.

There is a world of difference between that situation and one which says the sale will be made under the law at a given price, the appraisal of which—the fairness of the appraisal would often be a matter of dispute, and it often could bring on litigation.

Mr. SIGLER. I grant you that there is a big difference between a sale by competitive bid and by a sale by appraisal; but I was suggesting to you that if Congress authorizes a sale on the basis of appraised fair market value, that is the same standard that would be used if the

validity of the sale were tested in the courts; and, therefore, if you do your appraisal properly and sell on a fair appraisal, then that same appraisal ought to stand up when you get into court, if anyone takes you to court to contest it.

In other words, it is fair; it is a sale based upon the constitutional concept of just compensation, provided the appraisal really represents fair market value.

Senator CHURCH. Well, it would seem to me an open invitation to lawsuits in any case where you were disposing of land of substantial value and you had interests involved that were against the sale in the first place. I think, it is just an invitation to litigation.

Mr. SIGLER. I may say that the authority to sell on appraisals is not unique. Congress has granted it many times before.

Senator CHURCH. Yes, I know that; but the normal procedure is to sell on an open bid basis, with the provision that the land should not be sold for less than the appraised value as the real protection.

Mr. SIGLER. Yes, I agree. That is the customary procedure.

But I was addressing myself to your question about constitutionality. To restate it again, you can always test it, and the standard for testing it in a constitutional suit would be the same standard that is written in this bill.

Mr. CARVER. I might say that I consider the principal point here not to be the procedure for determining the value but, rather, the question of the preference itself. I hope we do not lose sight, when we are talking about which is the best way to arrive at the way we are going to sell, of the question as to whether or not there is some right in the individual to purchase it.

Senator CHURCH. Oh, yes. My own view is that the Indian tribe and the individual members of the Indian tribe should have preference as purchasers so that they may have a full and fair opportunity, if need be, with the additional help of public credit, to buy these lands; so that is not the point in issue.

My reaction to the kind of proposal that has been brought up here is that it is not going to untie any of these knots; and that is what we are trying to get at. We are trying to untie these knots and get this heirship problem, which is an unconscionable mess, straightened out.

Mr. CARVER. I certainly join with the Senator on that.

Senator CHURCH. There is one other question I want to ask, and then if you have any, Mr. Gamble, that you would like to ask while the Secretary is here, please do.

The question of probate and heirship. At the moment, about half of the allotted lands are in heirship status; and unless changed in the reading of the law, the balance of them will go into heirship status with the passage of time as the allottees die.

Now, is there anything in your proposal that would tend to prevent the land that is not already in heirship status from going into heirship status? That is, barring, of course, its acquisition by the tribe.

Mr. CARVER. There is no cutoff; there is no deadline date; there is not any stopping of the application of the laws of diminution. I know of no provision that we have made to—

Senator CHURCH. Is there anything that would deal with the probate problem and the terrific backlog that exists with respect to it?

Mr. CARVER. Not in this bill; no, sir.

Senator CHURCH. Would you explain to me a little more fully the kind of financing you have in mind for tribal acquisition of this heirship land?

Mr. CARVER. In a general way, we start off with the proposition that we now have authority, through our revolving loan fund; and we have supported a bill which removes the authorization limitation so that the question about the availability of the money is only a question of how much is appropriated. So we appraise the situation the tribe may apply for, and if it satisfied the Bureau that it could repay, had a reasonable basis for repayment, and if there were money available, and the purchase of the tribe for any of these lands could be for cash on whatever terms—

Senator CHURCH. In other words, you would see two or three ways by which the tribe could acquire the land? One would be to obtain a loan from the revolving fund?

Mr. CARVER. That is correct.

Senator CHURCH. And with the use of that money, pay the beneficial owners?

Mr. CARVER. Yes.

Senator CHURCH. And then repay the Government over a period of years?

Mr. CARVER. Yes, sir.

Senator CHURCH. From the actual utilization of the land, from the proceeds of the land itself?

Mr. CARVER. Yes. And we have added—

Senator CHURCH. Then you have added at least a couple of other methods?

Mr. CARVER. Yes. One method we have set forth is to give to the tribe, in the situations outlined in the bill, the authority in effect to purchase on the installment plan from the beneficial owners, giving them appropriate evidence of certificates of their share, respective shares of the fair market value. These certificates would be in the nature of debentures. They would bear interest, and they could be redeemed by the tribe as they had income from the property which they had acquired as they put it into production or, if the Secretary should so approve they could obligate their general tribal funds.

They would be given authority, or are given authority to go ahead and finance the money by using the land which they have acquired, mortgages, so to speak, and apply the proceeds of the mortgage to the beneficial owners.

But in a general way, it is an attempt to take the view that the land itself stands as security for the owners, and therefore they should not look to the Treasury to have the tribes buy the land from the beneficial owners.

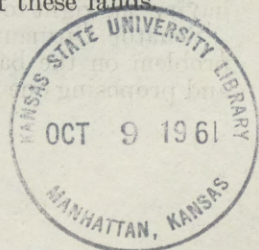
And, of course, the philosophy behind it is twofold. One is that it is not necessary in every case; and the other is that they are still members of the tribe, they have got a share, a continuing interest in this thing.

As a matter of fact, in addition to getting the proceeds of this thing, their share, they would also get the improved situation which we would hope to follow from more sensible management of these lands.

Now, I know of no other methods of financing.

Do you have any comment?

Mr. SIGLER. No.



Mr. CARVER. They could, of course, go down to the bank and borrow; but I mentioned that; either pledging, with the approval of the Secretary—pledging the credit of this land, or if they had the credit, as many tribes do, they just go borrow on their own note, private sources of credit.

We could require them to use other tribal incomes, as I stated before, and I suppose that other statements made by Secretary Udall indicate that he is thinking about application, in part, at least, of judgment proceeds; but that is not in this bill.

Senator CHURCH. Well, many of the matters that we have touched upon in this discussion are in S. 1392.

Mr. CARVER. Yes, sir; that is correct.

Senator CHURCH. And are not contained in the substitute proposal.

I would only say that I would think that the Indian Bureau would need some very good salesmen, that if they were to go out armed with this weapon to induce a group of allottees who are presently getting something out of some heirship land that is in production, first to persuade a majority of them that it ought to be disposed of; secondly, to persuade the Secretary of the Interior that this was for the benefit of the Indians; thirdly, to do it under circumstances to permit the tribe to acquire it for what might be less than the highest bid in an open bidding situation; and fourthly, not to permit the tribe to then pay cash for it, but to give out coupons, I O U's that will be redeemed over the next 30 or 40 years; if you can substitute this as a solution to the heirship problem, to put an end to the fractionation of land, you are going to have some of the best salesmen in your employ that I can picture.

Maybe I am wrong about it, but none of the answers that I have heard today would satisfy me that these questions are unfair or that a solution has really been reached.

Mr. CARVER. Well, as you say, Mr. Chairman, I do not consider any of the questions unfair, and perhaps I should reiterate what I said at the outset. We do not pretend to have the whole solution. We do emphasize two or three points which seem to me to be worthy of reiteration.

One is that we would like to give the tribe a preferential status on this thing. If you get a broad land base, if you will, it is not a matter of protecting it; it is a matter of extending it with the capital with which to work.

Senator CHURCH. S. 1392 is the tribal preference basis.

Mr. CARVER. Well, that is correct.

The other is—and this is a basic one—that we feel that the approach which we have set forth on the initiation of the proceedings is more sound; that is, that one person ought not to be able to trigger this thing, that we ought to have more than that. We came up with more than 50 percent.

I have suggested here, and it has been suggested this morning, that we have come up with different figures at different times. But we certainly do not think that we ought to go back down to any owner having the right to start it.

Senator CHURCH. Do you not think it is feasible to attack this problem on the basis of dividing heirship land into two categories and proposing one solution for one and another solution for the other;

that is, what do you mean by unproductive land? How would you define it? Who is to determine what in fact is unproductive and what in fact is productive?

I can see many, many cases where it will be very difficult to determine exactly which category was the proper one.

Mr. CARVER. Well, in the first place, the land which sits in amongst good agricultural land and is growing up to weeds, as is the situation in some reservations, would be the land with which we would like to start; and that is all this legislation amounts to. It is to give us a little more authority, a little stronger approach with the land which is idle, or which, as in the case that Congressman Berry brought up, the costs of administration so far outweigh the proceeds from the management of it that we have got to stop this thing.

Now, those two categories deserve a priority; and that is our view. Maybe we have come up with the wrong way to do it, but certainly that is where I would prefer to start.

I think that the economic waste as exists in some reservations—fine land with nothing on it or, in other situations, good land which may yield X dollars per year but it costs X plus, or two times X a year to administer it; these situations are enormously wasteful, and they create the wrong attitude toward government. We have got to get away from it. And this is not the same thing as having the matter triggered on a private property basis.

Senator CHURCH. Well, Senator, have you any further questions for the Secretary?

Senator ALLOTT. Two.

Mr. Secretary, I wanted to refer specifically to section 5 of your bill and ask this question:

If the lands under section 5 are purchased through competitive bidding by an individual Indian, is there any reason why he should be permitted to take the title in a trust or restricted status merely because he is already unfortunate enough to have such a fractionated interest in other lands?

Now, it seems to me this is a continuation of what I think is a false policy of the Government with respect to Indians.

Mr. CARVER. Well, if I understand this—

Senator ALLOTT. Well, under section 5(c) specifically, it says:

Title acquired by an Indian who is determined by the Secretary to need assistance * * *

You have under this section as distinguished from section 3, that title may be acquired by an individual Indian.

Why should he be permitted, or why should he be forced, either one, to take this land in trust?

Mr. CARVER. Well, now, our thinking on that has some logical difficulties in it, but I am sure you will be sympathetic with what they are.

If you have an Indian who has some land in restricted status already and it is an anomaly to have him have other land which is not; now, the cure of the anomaly may well be to have it unrestricted in every case. But at least this gives us a starting point on this thing.

Senator ALLOTT. But if he has been astute enough to acquire enough dollars to purchase a piece of land in an open competitive bidding, it seems a little ridiculous to stuff this back in the pot with the rest of the trust lands and keep it that way.

On the other side of the coin, Mr. Secretary, the answer is that you are at least divesting the Government of that much responsibility, even though he may still have an interest in restricted lands.

Mr. CARVER. Well, I will answer it in two parts there, Senator Allott. In the first place, we are talking about the same land—he already owns a trust or restricted interest in such lands.

The second point is that you do not really save yourself any responsibility with reference to any particular Indian if there is any trust land left.

Senator ALLOTT. That is exactly right.

Senator CHURCH. You say responsibility with respect to land?

Mr. CARVER. Or with respect to him. You have got to keep the same sort of a—well, I suppose you do mean with respect to him; but, nevertheless, you have to take into account what his total situation is. In other words, you have to take that person with what he has got, and if there is this trust string at any place, then you have got to—

Senator ALLOTT. Well, let us look at it on a broad scale, Mr. Carver. Here is a man who is, we will say, 30 years old. He is, except through such traditions that are passed through his family, an American like the rest of us, probably in every sense of the word. He has been educated in American schools, he does all the same things that everyone else does. Now, he happens to be an heir on other fractionated lands. Why should you say to this man, who has accumulated the money to make a bid and purchase lands: You are forced to take this with a restriction, whether you want to or not?

Mr. CARVER. I do not think we have said that. It is only in this land that has a trust or restricted status.

Senator CHURCH. You mean it stays that way; it is restricted in status?

Mr. CARVER. Yes. In other words, this is not a bill to take land out of the trust status by virtue of the application of any of its terms.

Senator ALLOTT. Yes. I missed the word "such" there.

But even then, my hypothesis, it seems to me, is just as applicable. Why should the land revert to trust status?

Mr. CARVER. I do not think we provided that, unless under this same section there was a determination—and it has to be an affirmative one—that there has to be a trust relationship with respect to him.

Senator ALLOTT. How can you say he needs assistance in handling his affairs when in a competitive purchase he has demonstrated that he does not?

Mr. CARVER. I do not know that we can. But that is the only thing it applies this way.

Senator CHURCH. Well, we have this land where we have this heirship problem. The land is owned by a hundred owners. Let us suppose that we are lucky enough to go through the procedures you propose and get this piece of land sold, and it is sold to another allottee and he acquires it again as restricted land, and he dies and it is back in the heirship problem again; is it not?

Mr. CARVER. No.

Senator CHURCH. Well, in more cases than not it will be. Is that not right?

Mr. CARVER. I suppose it is, yes.

Senator CHURCH. Well, there is not any way out. We only get in deeper and deeper.

Senator ALLOTT. That is exactly the point, Mr. Chairman.

Senator CHURCH. I just want to read something in the record at this point, because this goes back to 1910, Senator, and the law placed upon the Secretary in 1910 the obligation to get this restricted land out of restricted status where the owners were competent. Do you think that they have never found any competent Indians?

In 1910—

Senator ALLOTT. 51 years later.

Senator CHURCH. 51 years later, we are up against this mess.

And here is what the law said that the Secretary was obliged to carry out away back in 1910. This was the law ever since. It says:

If the Secretary of the Interior decides the heir or heirs or such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent. If he shall decide one or more of the heirs be incompetent, he may in his discretion cause such lands to be sold.

In other words—and let me read this other provision:

That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is capable or competent of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple.

Now, we have had in the law provisions which: (1) would allow the allottee to be issued a patent in fee simple where the Secretary determined him to be competent to handle his own lands; and (2) a provision permitting the Secretary, in the case of his heirs, to give them the land of the decedent where he finds the heirs to be competent, to be given that land in fee. And obviously this has not been done.

And here we are 51 years later with this heirship problem. And you have not come up with any proposed solutions that are meaningful, in my judgment, and the question is really: Are we going to do anything about this, or are we just going to continue to talk about it and throw more ropes around the problem?

I am sorry; I did not mean to interrupt your inquiry.

Senator ALLOTT. That is perfectly all right, Mr. Chairman.

Mr. CARVER. When you say, Mr. Chairman, that that provision of the statute is there, so far as I know it has been there the whole 51 years since. Congress and the Department have gone over this matter together in every year since then. Now, maybe it now should be the practice. I do not know. But it would be a very significant step for us to suddenly start this approach to the ending of the trust status.

Senator CHURCH. Well, what you are saying is that this has been the law for 51 years and nobody has paid any attention to it.

Mr. CARVER. Yes, sir.

Senator CHURCH. Obviously, the Secretary has not.

Mr. CARVER. And equally obviously, Congress has concurred in this lack of attention.

Senator CHURCH. Well, now—

Mr. CARVER. Because bill after bill—

Senator CHURCH. Has Congress ever amended that? Is that still the law? Has Congress ever amended it or said "Do not pay any attention to it, Mr. Secretary"?

Mr. CARVER. No; I think not.

Senator CHURCH. No; I think this has been the law of Congress. And I think if we are going to have a solution of the heirship problem, we are going to have to come up with a law that gives us reasonable expectation that progress can be made.

I am through. Are you through, Senator Allott?

Senator ALLOTT. No. I did not get my first question really answered yet.

Now, take section 5(c): You say that when title is acquired by an Indian who is determined by the Secretary to need assistance in handling his affairs or by an Indian who already owns a trust or restricted interest in such lands; so that it is possible for an Indian to acquire title, unrestricted title, under this section?

Mr. CARVER. Yes, sir.

Senator ALLOTT. But the Secretary would have to make a finding in each one of these alternative cases that if he did own other trust lands, he could not. And I have already gone into what I considered to be the equities of that situation.

Mr. CARVER. Well, I do not really think that I—I think I contributed to some confusion on that, Senator, and I would like to clear that up.

I do not think that our bill applies to the question I discussed about the ownership of other lands. It is these lands.

Senator ALLOTT. It is these specific lands?

Mr. CARVER. Yes.

Senator ALLOTT. And the word "such" is the limiting and qualifying word there?

Mr. CARVER. Yes, sir.

Senator ALLOTT. Now, the second question: By providing that any lands so purchased should be tax exempt, would not the bill serve to encourage the continuation of trust or restricted lands and thus serve to perpetuate the heirship problem in that respect?

Mr. CARVER. I think so.

Senator ALLOTT. What?

Mr. CARVER. I think so; yes, sir.

Senator ALLOTT. Thank you.

That is all.

Senator CHURCH. Thank you very much, gentlemen, for your testimony.

The next witness will be Mr. Roy S. Lindgren, Assistant Director of the Civil Accounting and Auditing Division of the General Accounting Office.

Mr. CARVER. Mr. Chairman, may I be excused for an appearance over in the House of Representatives.

Senator CHURCH. You certainly may.

Mr. CARVER. Thank you.

Senator CHURCH. Would you have a seat, and you might introduce your associates and then proceed to present your statement.

Mr. LINDGREN. All right, sir.

STATEMENT OF ROY S. LINDGREN, ASSISTANT DIRECTOR, CIVIL ACCOUNTING AND AUDITING DIVISION, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY JAMES MASTERSON, OFFICE OF THE GENERAL COUNSEL, AND JOHN R. KURELICH AND ARTHUR HARMAN, JR., CIVIL ACCOUNTING AND AUDITING DIVISION

Mr. LINDGREN. Mr. Chairman and members of the subcommittee, we appreciate this opportunity to appear before you today in connection with S. 1392 and H.R. 8077, which concern the Indian heirship problem and related matters. With me are Mr. James Masterson, Office of the General Counsel, and Messrs. John R. Kurelich and Arthur Harman, Jr., Civil Accounting and Auditing Division.

The extensive studies recently concluded by the staffs of both the Senate and House Committees on Interior and Insular Affairs show the vast dimensions of the perplexing Indian heirship land problem which is considered to be one of the most serious problems facing our American Indian population. The problem is constantly growing because of the increasing fractionation of the Indian ownership interests in the land held in trust by the Department of the Interior. Cost of the Federal Government to administer various aspects of the Indian land program rise with the increasing fractionation of the Indian ownership in these lands, and the utilization of the lands decreases because of associated problems.

Since the beginning of our comprehensive audit of the Bureau of Indian Affairs, the General Accounting Office has issued several reports to the Congress in which the problems of management of Indian trust property have been discussed. In our first report to the Congress on the audit of the Bureau of Indian Affairs for fiscal years 1952 and 1953 (B-114868, dated March 9, 1955), we stated that more than 3,000 laws relate directly or indirectly to Indian lands, affect the status of the lands, and govern the manner in which they may be conveyed and by which the restrictions may be removed. We pointed out that as the number of heirs increase through the process of inheritance, the problem of maintaining accurate land records to show the current interest of the increasing number of respective owners becomes greater and more time is required for the completion of any land transaction.

The Bureau of Indian Affairs maintains about 38,000 individual Indian money accounts, similar to a commercial banking operation. One of the principal reasons for this operation is because of the Department's trust responsibility for the administration of Indian lands and the income derived therefrom. During fiscal year 1961, collections of individual Indian moneys totaled about \$67.2 million and disbursements totaled about \$66.1 million. To perform banking services for Indians, the Bureau has 10 special disbursing agents and 95 deputy disbursing agents in addition to the bookkeeping and clerical staffs at numerous agency and areas offices. Funds allotted in fiscal year 1955 for performing these banking services for Indians and accounting for individual Indian moneys totaled \$520,477. The amount requested for these activities for fiscal year 1962 was \$923,314, an increase of about \$400,000, or 77 percent in 7 years. Funds allotted for land management activities in fiscal year 1955 totaled \$792,228. The amount requested for these activities for fiscal year 1962 was

\$2,743,797, an increase of about \$3 million, or 370 percent in just 7 years. If the heirship land problem continues unchecked the number of trust accounts will increase, the computation of income distribution will become further complicated, and the amount of appropriations needed to administer these activities will further increase.

In a report to the Congress on November 26, 1956 (B-114868), we pointed out how the Bureau's administration of Indian lands is complicated by the heirship problem. In the report we included representative examples to illustrate the problems encountered by the Bureau in distributing lease income or sales proceeds from the sale of the land. One of the examples was an allotment of land at the Winnebago Agency, in the Aberdeen area, leased during 1954 for \$180. This income was divided among 66 heirs, some of whom received only 3 cents. In 1955 the number of heirs sharing in the proceeds of this lease increased to 90. Another example was the sale of a 116-acre allotment of Indian land in 1955 to the Corps of Engineers. The appraised value was \$6,923 which was assigned to the 102 beneficial owners in common in amounts ranging from a low 37 cents to a high of about \$1,154, with 48 of the owners receiving amounts less than \$19. In the latter case the numerator of the fractional interests ranged from a low of 2,887,967,628 to a high of 9,044,785,814,000—the common denominator was the horrible figure of 54,268,714,886,400. One can readily see why the costs of the Bureau have continually increased for the administration of Indian heirship lands and related income in view of the involved records that must be maintained and the elaborate computations that must be made to distribute sales proceeds and monthly lease income to appropriate individual Indian money accounts.

In the report we also cited cases where the sale of heirship land had been requested by some of the heirs but the sale was not made because written consent of all of the heirs could not be obtained by the Bureau. Consent in some cases was not obtained because heirs could not be located or were uninterested, and in other cases because owners of small interests refused to sell. In addition, we discussed some of the complications arising from the Indian heirship land problem in the probate of Indian estates. The examiners of inheritance under the Office of the Solicitor, Department of the Interior, probate Indian estates. To illustrate the complexity arising from the multiple ownership of Indian land, we cited two cases probated in the Gallup area. In one case an Indian shared in 9 estates through her second husband and also in 2 other estates. The total value of her share of these 11 estates was \$703, with 6 of the estates being valued at less than \$15. Her 9 children and 7 of her grandchildren shared in these estates at her death. Consequently, the interest in the 11 estates was divided into 176 shares ranging in amount from 3 cents to \$30. In the other case, an estate valued at \$240 had 71 heirs at time of probate. Forty-three heirs received more than a \$1 share in the estate and, of the remaining 28 heirs, 14 received shares valued at less than 10 cents. The fractional shares ranged from $837/4,515,840$ to $263,655/4,515,840$. Also, the distribution of probate fees to each heir in the event that the fee is not deducted from the estate, may take considerable time to calculate. For example, in one case in the Sacramento area, 39 heirs were charged a pro rata share of a \$15 probate fee. Half of the fee

was charged to one heir and the other half was charged to the other 38 heirs based on their fractional interests. The work sheet for this distribution was prepared by three employees and it took 2 man-days to prepare it. The cost of calculating the distribution was greater than the probate fee.

At May 31, 1961, the Department's examiners of inheritance had a backlog of 1,987 probate cases, an increase of 112 over the June 30, 1960, backlog and an equivalent of about the number of cases received in the past 16 months. From June 30, 1958, through May 31, 1961, the backlog has increased by 344 cases or about 21 percent.

Many Indians who are competent to handle their own affairs are reluctant to voluntarily terminate the trust status of their lands because of the personal advantages accruing from the trust status to such Indians, such as exemption from real estate taxes on trust land and the services rendered by the Bureau in connection with the management of Indian trust property either without charge or with relatively low fees. In our 1956 report to the Congress, we pointed out that many Indians who have a beneficial interest in Indian lands held in trust by the Department are employed by the Bureau of Indian Affairs. The positions these Indians hold include teachers, engineers, clerks, machine operators, and Bureau officials. Such employment not only gives strong indication that these Indians are competent of handling their own affairs, but also raises the probability that these employees are not likely to encourage other Indians with whom they come in contact, by reason of Bureau employment, to request patents-in-fee, certificates of competency, or orders removing restrictions. There is no general legislative authority to permit the Secretary of the Interior to convey to competent Indians clear title to their lands without application by the Indian. In the reports we issued to the Congress on August 8, 1958, and March 21, 1961, in connection with our review of the Bureau's termination of Federal supervision over Indian affairs pursuant to House Concurrent Resolution 108, approved by the 83d Congress on August 1, 1953, we commented on the need for the Congress to enact appropriate legislation to help solve the heirship problem.

We believe that one of the major solutions to the complicated heirship problem is to have the Secretary convey to competent Indians clear title to their lands without the need for the Indians to apply. Such action is especially vital now with respect to about 6 million acres of land held in trust for the original Indian allottees, to prevent these lands from going into heirship status. In principle our view is basically in agreement with the one expressed by the task force appointed by the Secretary of the Interior to study the Federal Indian program. The task force believes that eligibility for special Federal services should be withdrawn from Indians with substantial incomes and superior educational experiences, who are as competent as most non-Indians to look after their own affairs. However, the words "substantial" and "superior" used by the task force are subject to varying interpretations and are therefore in need of adequate clarification.

Our Office was requested by the chairman, Senate Committee on Interior and Insular Affairs, to comment on S. 1392 and on draft language which was later introduced as H.R. 8077. Our reply of April 27, 1961, expressed basic agreement with S. 1392 because it

provides the means by which that portion of the estimated 6 million acres of land now being held in trust for the original allottees who are considered to be competent will be kept from becoming involved in the heirship problem. In addition, S. 1392 provides measures to halt the further fractionation of a large portion of the estimated 6.2 million acres of land now in heirship status by providing that in any case of transfer of title to Indian trust or restricted land or an interest therein by inheritance or devise, the title shall pass by operation of law into a nontrust or unrestricted status unless the Secretary of the Interior determines the Indian heir or devisee to be incompetent of managing his business affairs. In essence, S. 1392 would provide for competent Indians to begin handling their own affairs, but continuing the trust relationship for the Indians that the Secretary determines to be incompetent.

In our comments dated August 8, 1961, on H.R. 8077 we pointed out that this bill, which is sponsored by the Department as a substitute for S. 1392, does not adequately cope with these two aspects of the heirship problem. In our comments, we point out also a number of other serious deficiencies in H.R. 8077, such as the following:

1. Tribes instead of the owners in common are given preferential right to buy certain lands in heirship status and would be able to acquire such lands at the appraised fair market value which would not necessarily assure the owners the highest possible price. These provisions appear to be inconsistent with the Department's trust responsibility.

2. Tribes would be permitted to buy certain heirship land by issuing to the owners certificates which do not constitute an encumbrance upon the lands. Therefore, the former Indian owners would hold unsecured notes which provide inadequate protection to the owners. This provision appears also to be inconsistent with the Department's trust responsibility.

3. Requiring a majority Indian interest in trust or restricted lands to bring about a sale or partition of such lands not only places additional obstacles in the way of carrying out such action but also is inconsistent with the law applicable to other American citizens which permits any owner in common to bring about the sale or partition of property in joint ownership.

4. No provision is made to avoid continued fractionation of the Indian ownership interests in mineral rights retained in the partition or sale of heirship lands.

These deficiencies, along with a number of others, are discussed in greater detail in the letter we sent to the chairman, Senate Committee on Interior and Insular Affairs, on August 8, 1961.

In proposing H.R. 8077 as a substitute for S. 1392, the Department states that section 10 of S. 1392, which basically provides for competent Indians to receive unrestricted title to the lands in which they hold a beneficial interest, is in need of further study. The Department has been aware of the Indian heirship problem for years. The studies recently completed by the Senate and House Committees on Interior and Insular Affairs represent the most complete and comprehensive study made of the problem. In addition, the Secretary's task force and our Office have given consideration to the problem. In view of all the effort that has been devoted to this problem in recent years, we

believe that a sufficient knowledge of the problem now exists to guide the Congress to a legislative solution. Additional delays will merely further complicate the problem and make any solution more difficult as well as causing the vast amount of beneficial data developed by the Senate and House committee staffs to become outdated and less useful.

This concludes our statement, Mr. Chairman. We shall be pleased to answer any questions to the best of our ability.

Senator CHURCH. That is a very fine statement, Mr. Lindgren. I think it is very cogent and sums up your case in very good style.

I have no question that I want to ask. Senator Allott?

Senator ALLOTT. Mr. Lindgren, I want to congratulate you and the members of your Division of the General Accounting Office for attacking this question in what I consider a forthright manner with respect to the problem involved.

I obtained a copy of your report here last evening when it was delivered to the committee, and studied it last evening, and I must say that I find it a clearly sound and sensible approach to this problem.

I noted in the study of the committee which I have before me that there are 95 field agency personnel engaged in heirship land work. This table is No. 27, which appears on page 894 of the fine work done by the staff. Do you happen to know how many more are engaged in the office in Washington in the same type of work? I counted these and I counted them up to 95, but my astigmatism might have missed 1 or 2. But it is somewhere in that neighborhood.

Mr. KURELICH. I believe in our 1955 report that at that time there were 150 people engaged in land management activity. I do not know how many are engaged today.

Senator ALLOTT. So based upon that figure, which is somewhat out of date now, it would be at least in the neighborhood of 240 or more? I am sure that, by Parkinson's law, it has not decreased any.

There is one question which occurred to me with respect to your statement, and that occurs on pages 7 and 8, in which you make reference to the competency situation with respect to Indians.

Now, with respect to any individual, we might all have varying degrees of competency, and we know, of course, that plain business acumen varies greatly from individual to individual, regardless of whether they are Indians or what they are. And I wonder why the determination of the incompetency should be left to the Secretary. Why should not the question of competency be left to the State courts as it is with any other individual?

Mr. HARMON. The only thought that I would express on the point you raise, Senator, is perhaps it would be quite a flood on the State courts. I understand that most courts are pretty well jammed up with other types of proceedings, and if the Congress were to throw that burden onto the State courts, it might just create a larger backlog before the courts could get around to pass judgments whether or not these Indians were incompetent or competent.

Senator ALLOTT. Well, what I was thinking of, in the first place, most State courts dealing with this question are not greatly overcrowded. Normally this question is dealt with in the probate court, which does not bear the great backlog of cases that the courts of general jurisdiction do. This is No. 1. I just throw this out for thought.

No. 2, do you think that there would be a great flood of Indians coming into court to say "I am incompetent"?

I cannot quite conceive of this. And either they or their fellow tribesmen would have to come in and sign a complaint to say that they are incompetent. Now, I cannot conceive of many of these individuals doing this by themselves. And I think, as with all other people, there is a presumption of competence until you have a determination of incompetency.

Mr. KURELICH. Perhaps there would be no problem with these people trying to retain their incompetent status so long as they know there is a dollar benefit. They are sufficiently competent to realize this benefit of being incompetent. As long as they are going to save on their real estate taxes or receive other benefits, it would be a logical assumption that they would try to retain an incompetent status.

Senator CHURCH. I just wanted to add on this point that in 1955 the Congress passed a Public Law 348 in which the Congress conferred on the Secretary of the Interior the authority to declare competent members of the Five Civilized Tribes that were covered in the act. The Secretary was given the authority to declare these individuals competent, without their application, upon his finding that they were in fact competent. The expectation of the Congress was that with respect to these tribes most of the individual members would soon be declared competent on the Secretary's own initiative. That was in 1955. There are some 30,000 or 36,000 Indians in all, involved in the five tribes. Approximately 200 have been declared competent by the Secretary under the authority of this act, which is considerably less, of course, than the number of children being born.

Now, in other words, under the authority of the special enactment conferring the full initiative upon the Secretary we are losing ground. More incompetents are being created by the natural processes than the Secretary is declaring competent by the authority given him under the act.

Mr. Mangan, is that accurate?

Mr. MANGAN. I think your statistic about 200 being declared competent is, to my knowledge, accurate. We know that those being born far outnumber that in a year. So your conclusion must be correct.

Senator CHURCH. Thank you.

Do you have any further questions of these gentlemen?

Senator ALLOTT. No, I think not.

Senator CHURCH. Thank you very much for your statement and your testimony. Gentlemen, we will have no further need for you, and we appreciate your waiting through a long day.

We have to go now to a record vote on the floor of the Senate. As it is extremely unlikely that we can return within a reasonable time, it will be necessary to recess the hearing until tomorrow morning at 10 o'clock.

(Whereupon, at 4 p.m., the subcommittee was recessed until 10 a.m., Thursday, August 10, 1961.)

INDIAN HEIRSHIP LAND PROBLEM

THURSDAY, AUGUST 10, 1961

U.S. SENATE,
SUBCOMMITTEE ON INDIAN AFFAIRS,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 3110, New Senate Office Building, Senator Frank Church presiding.

Present: Senators Church, Burdick, and Allott.

Also present: Senator Henry Dworshak.

Also present: James H. Gamble, professional staff member.

Senator CHURCH. The hearing will come to order.

Mr. Floyd L. France and Mr. Harry A. Sellery, please come forward to the committee table.

These gentlemen are from the Department of Justice. Mr. France is from the Lands Division, and Mr. Sellery is from the Office of Legal Counsel in the Department of Justice.

We are happy to welcome you this morning, gentlemen.

I understand, Mr. Sellery, that you have been with the Bureau of Indian Affairs in the past. Is that correct?

Mr. SELLERY. Yes, sir.

Senator CHURCH. And have appeared before this subcommittee previously.

Mr. SELLERY. Yes.

Senator CHURCH. We are happy to have you both here this morning. Why don't you proceed as you care to in presenting your testimony.

Do you have a prepared statement?

STATEMENTS OF FLOYD L. FRANCE, LANDS DIVISION, DEPARTMENT OF JUSTICE, AND HARRY A. SELLERY, OFFICE OF LEGAL COUNSEL

Mr. SELLERY. No, sir, we do not. We understood primarily we were here to answer such questions as the committee might have.

There has been submitted to the committee the Department's report on S. 1392 in a letter signed by the Deputy Attorney General, dated August 9, 1961. And there has also been submitted to the committee a letter from the Budget Bureau dated August 9, 1961, both letters addressed to Senator Anderson.

Senator CHURCH. Since this report from the Department of Justice has just come up and we haven't had an opportunity to read it ourselves, why don't you read it into the record at this point.

Mr. SELLERY. I will.

The letter on S. 1392, addressed to Senator Anderson as chairman of the committee, reads as follows:

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill, S. 1392, relating to the Indian heirship land problem.

This bill is a measure proposed to aid in a solution of the problem of the administration of Indian trust or restricted allotments resulting from the fractionation among multiple owners of the beneficial interest therein under the statutes governing the descent and distribution of such allotments (36 Stat. 855, as amended, 25 U.S.C. 372 and 373 (1958)).

The bill would authorize and direct the Secretary of the Interior, upon the request of any such owner, to partition or sell the undivided interest therein, unless the Secretary finds that such partition or sale would not be in the best interests of the Indian owners and so reports to Congress. The bill also specifies that such sales shall be at a price not less than one substantially equal to the appraised value, and that the proceeds shall be distributed under the individual Indian money regulations (25 CFR, pt. 104 (Supp. 1960)). The bill would also authorize interest-bearing loans by the Federal Government to an Indian tribe which wants to purchase such interests and which has a plan for their use that the Secretary has approved. As security for the loan the tribe would be required to give the United States a mortgage on land so purchased and on such other tribal property as the Secretary deems necessary to secure the loan adequately.

As guardian of the Indian tribal and individual Indian wards of the Nation and as trustee of their trust or restricted property, the United States has plenary power to manage Indian affairs. (Cf. *Thomas v. Gay*, 169 U.S. 264 (1898); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).) While the power is subject to the Constitution, *Stephens v. Cherokee Nation* (174 U.S. 445 (1899)), the provisions of the bill for prompt payment in full for the account of the Indian owners of a price not less than substantially the fair market value of Indian heirship land which may be sold under the bill appear to be constitutionally adequate. (Cf. *Choate v. Trapp*, 224 U.S. 665 (1912); cf. also *33 Op. Atty. Gen.* 25 (1921), 59 Interior Dec. 100 (1945).)

The subject of this legislation is not a matter for which the Department of Justice has primary responsibility, and accordingly we make no recommendation as to the enactment of the bill. However, there are certain features of the proposal to which attention is invited.

Since it is only by implication that the bill would authorize the Secretary to issue rule and regulations respecting the subject matter of the bill the committee may wish to consider whether specific authority in this connection should be provided.

Section 10 of the bill would make a number of provisions to prevent as far as possible an increase in the heirship land problem. Section 10(b) would provide that title to an interest in heirship land shall pass by operation of law in a nontrust or unrestricted status unless the Secretary of the Interior determines before the close of an Indian probate proceeding that the Indian heir or devisee is not competent to manage his own business affairs with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing his property or the benefits thereof, the standards prescribed in *United States v. Debell* (227 Fed. 760, 770 (8th Cir. 1915)). Section 10(c) would impose a like requirement on other acquisition by an Indian of title to land or an interest therein in a trust or restricted status, i.e., land which may later pass into Indian heirship status.

"If the Secretary terminates the trust status or restrictions on alienation of title to Indian land or an Indian interest therein, under 10(g) of the bill the Indian may apply to the appropriate U.S. district court for an order setting aside the Secretary's action, and the court shall have jurisdiction to issue such order, if, in its judgment, the Indian lacks the prescribed capacity to manage his own business affairs. Since any such action by the Secretary will normally make the lands subject to State and local real property taxation (cf. 24 Stat. 390, as amended, 25 U.S.C. 349 (1958)), it seems probable that many of the Indians whom the Secretary might find competent under 10 (b) and (c) to manage their respective business affairs would file an application with the appropriate district court to have the Secretary's order of competency or order removing restrictions set aside. If so, this provision will increase the judicial backlog

of civil suits in those district courts in which such Indian lands may be located. For the most recently available statistics on that backlog, see table C-1 in the material following page 12 in the Quarterly Report of the Director of the Administrative Office of the U.S. Courts for the third quarter of fiscal year 1961 (January 1 to March 31, 1961).

In addition 10(g) would provide for judicial review of the question of the competency of an individual Indian, a matter which has historically been under the exclusive jurisdiction of the Secretary of the Interior. In view of the prospect that 10(g) would increase the existing backlog of civil suits in the district courts in which there are Indian lands, and in view of the historic practice of leaving to the Secretary exclusive jurisdiction over determinations as to the competency of an individual Indian attention is invited to the questions of policy that 10(g) would raise.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Shall I read the letter on the substitute bill of Interior?

Senator CHURCH. Yes. I was just going to ask you about it.

You see no constitutional objections to the procedures set out in S. 1392, I take it from the reading of the report. You raise a policy question in connection with one section, 10(g), but, apart from that, the Department has found no constitutional objections to the provisions of the bill, I take it.

Mr. SELLERY. That is correct.

Senator CHURCH. I think we should have your comment on the proposed substitute. I think you might read that into the record, too.

Mr. SELLERY. This is a letter dated August 8, 1961, addressed to the Honorable David E. Bell, Director, Bureau of the Budget. Mr. Bell transmitted it to the committee in a letter dated August 9, 1961.

Senator CHURCH. Do we have copies of this letter?

Senator BURDICK. Mr. Bell's statement.

Mr. GAMBLE. Yes, sir; it is attached to the communication from the Bureau of the Budget.

Mr. SELLERY (reading):

DEAR MR. BELL: This is in response to your request for the views of the Department of Justice on a proposed report of the Department of the Interior on the bill S. 1392, relating to the Indian heirship land problem.

The four paragraphs in the material numbered "2" on pages 1 and 2 of the draft report summarize the Indian heirship land problem arising under the statutes governing the descent and distribution of Indian allotted lands (25 U.S.C. 372 and 373 (1958)), and some of the provisions of the proposed substitute draft bill. As far as is here material, section 3 of the substitute bill would authorize the Secretary of the Interior to convey to the Indian tribe occupying a reservation, with its consent, the complete beneficial interest in an Indian trust or restricted allotment in that reservation which is in heirship status and which there is fractionation among multiple owners of the beneficial interest therein, without the consent of such owners, in consideration of the payment to each of them of his respective proportionate share of the appraised fair market value of such interest. As set forth in the draft report, the substitute bill would provide that such payment may be made in instalments, and that the obligation to pay may be evidenced by interest-bearing certificates of indebtedness issued to a former individual Indian owner, representing his proportionate share of such value.

While the draft report would indicate that the holder of a certificate is assured of some minimum annual payment, either from income from the land or out of tribal income generally, it should be noted that under the redemption provisions in section 3(c) of the substitute bill, any such minimum annual payment from tribal income generally is entirely a matter in the discretion of the Secretary. Moreover, the draft report does not refer to section 3(d) of the substitute bill, expressly providing that outstanding certificates shall not be an encumbrance on such land, and that such land may be otherwise encumbered or mortgaged by the tribe with the approval of the Secretary. In short, the immedi-

ate holder of such a certificate would receive it as the result of a transaction which would constitute not only an involuntary, but also an unsecured loan by him to finance for the benefit of the tribe the purchase on an installment plan of his beneficial interest in an allotment in heirship status.

The draft bill does not make it clear whether the Secretary, the tribe, or either, may issue a certificate. In either event, in view of the limitations in section 3(c) of the substitute bill as to the source of funds to redeem a certificate, it would seem that a certificate would not be an express or implied contract with the United States on which the certificate holder, in the event of default, could recover payment from the United States under the Tucker Act (62 Stat. 940, 28 U.S.C. sec. 1491 (1958)). Since any claim against the United States would be that of the individual holder, as distinguished from an Indian tribe, it would not be cognizable as an Indian claim against the United States within the provisions of 28 U.S.C. 1505 (1958). In the event of default, a holder would have no recourse against the United States.

The general rule set forth in the Federal Indian Law, U.S. Interior Department, 725 (1958), and in Handbook of Federal Indian Law, U.S. Interior Department, 339 (1942), is that tribal funds held by the United States are not subject to the claims of third parties unless payment thereof is clearly authorized by statute or treaty, or by lawful action of the tribe itself. Under the substitute bill, in the event of default, the holder of a certificate would have no assured recourse to tribal funds held by the United States. The certificate would, therefore, have little, if any, merchantability.

It is true that the United States, as guardian of Indian tribes and individual Indians and as trustee of their trust or restricted property, possesses a plenary power to manage Indian affairs which is not to be confused with its power of eminent domain. Under its power to manage Indian affairs, it may, without making compensation, do many things affecting Indian property. Under that power it may lease tribal lands and apply the rentals for the benefit of the tribe. (See *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).)

This power is, however, subject to the Constitution (*Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899)). In addition, the Supreme Court has held that the private property rights of an Indian are constitutionally secured and enforced to the same extent and in the same way as those of other residents and citizens of the United States, although the Indian may be subject to the guardianship of the United States as to his personal status (*Choate v. Trapp* (224 U.S. 665, 677 (1912)), and cases cited there).

If the substitute bill is predicated on the theory that a conveyance by the Secretary to the tribe is an exercise of the power of eminent domain of the Federal Government to condemn interests in private property for public use and that condemnation for the benefit of an Indian tribe constitutes a public use, it should be noted that the guarantee of just compensation in the fifth amendment to the Constitution for property taken for public use entitles the owner to certain and adequate provision for obtaining compensation before his occupancy is disturbed. (*Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 611, 659 (1890)). This guarantee does not mean receiving annual stipends, but means that owners are entitled to compensation; not that their heirs or estates are to receive installment payments (*United States v. 9.94 Acres of Land in City of Charleston*, 51 F. Supp. 478 (D.C.S.C. 1943)). The substitute bill fails to make certain and adequate provision for obtaining compensation, and it specifically provides for installment payments. In both respects, it fails to meet the constitutional guarantee of just compensation under the fifth amendment for property taken for public use.

If, on the other hand, the substitute bill is predicated on the theory that under the plenary power of the Federal Government to manage Indian affairs, Congress may enact legislation authorizing the Secretary to convey to an Indian tribe the entire beneficial interest in an allotment in heirship status on which there is a fractionation of that interest among multiple owners, the provisions of the substitute bill, denying an Indian immediate and full payment for his interest in privately owned Indian property, fail to meet the standard prescribed by the Supreme Court respecting the protection of such private property rights.

Also, it is noted that section 4 of the proposal would extend the Secretary's authority to sell fractionated interests in or small tracts of trust or restricted lands upon his determination that they are idle or economically unproductive, or to lease such interests or to contract to sell the timber thereon "without the

consent of the owners." The interests mentioned are vested, and doubts arise as to the constitutionality of such disposal. The retention of ownership of the interests by tribes purchasing them would not appear to dissipate such doubt. The provisions of section 7 that the Secretary shall give actual or constructive notice of such disposal, and shall provide opportunity to any party in interest to submit written or oral objection, may meet requirements as to due process, but do not supersede the requirement of judicial determination of just compensation in exercise of the power of eminent domain. As mentioned above, the private property rights of an Indian are constitutionally secured to the same extent as those of other citizens, although he may be subject to the guardianship of the United States as to his personal status (*Choate v. Trapp*, 224 U.S. 665, 677). As stated by Mr. Justice Van Devanter in *Chippewa Indians v. United States* (301 U.S. 358 (1937)):

"Our decisions, while recognizing that the Government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the Government to give the lands of one tribe or band to another, or to deal with them as its own.—Id., 375-376."

Subject to the foregoing conclusions, the Department of Justice would have no objection to the proposed report of the Department of Interior.

Sincerely yours,

BYRON R. WHITE, *Deputy Attorney General*.

There is attached to the papers in which this report appears a letter from the Bureau of the Budget to Senator Anderson, which, after summarizing the provisions of the bill, says:

We are enclosing for the information of your committee the views of the Department of Justice on the Interior proposed substitute. These views raise serious questions about the portions of the draft bill which deal with the compensation of individuals whose interests in heirship lands would be sold.

If these questions are resolved to the satisfaction of the committee, the Bureau of the Budget would not object to enactment of the proposed substitute bill.

Senator CHURCH. Then we are in a situation where the Budget Bureau has said that if the committee can satisfy itself that the provisions of the draft bill are not unconstitutional, the Bureau of the Budget would not object to the bill. The Department of Justice has submitted a report in which it says, as I have read it and have listened to you read it, that, in the opinion of the Department of Justice, the provisions are not constitutional, and then you conclude your letter with the statement "subject to the foregoing conclusions" you have no objection. You have no objection to the bill, and the "foregoing conclusions" are that the provisions are unconstitutional. Isn't that right?

Mr. SELLERY. Well, one provision; yes, sir.

Senator CHURCH. Yesterday, when Mr. Carver was testifying on behalf of the Department of the Interior, he took issue with the position taken by the Justice Department, upon the ground that the opinion of the Justice Department was based upon the law of eminent domain and that the draft proposal of the Interior Department was based upon the law that governs trusteeships, and that, as the Interior Department viewed their draft, it was not subject to constitutional objection because it all fell within the scope of the normal power that a trustee has to manage the corpus of the trust, and that, as viewed within this context, it was not subject to constitutional question.

What would be your view of that proposition?

Mr. FRANCE. Mr. Chairman, I believe the question you have just raised is also discussed in the Deputy Attorney General's letter to the

Bureau of the Budget. He says, first, if the bill is predicated on the theory of eminent domain, then there must be just compensation.

Following that, he discusses the very point which was discussed by Secretary Carver, and expresses a view that the provisions for issuing only certificates of indebtedness, rather than making a payment of actual value, would not meet the requirements, the constitutional requirements.

So, as I understand the Deputy Attorney General's letter, he feels that under either view the bill is not constitutional.

Senator CHURCH. Do you have any questions, Senator?

Senator BURDICK. Either one of you gentlemen can answer the questions.

I understand, from hearing your testimony, that, in the opinion of the Department of Justice, there is no way to terminate the vested rights whether in trust status or in ownership held in unrestricted manner without the owner's consent or upon notice by some legal proceeding.

Mr. FRANCE. I did not understand the last part of your question, sir.

Senator BURDICK. There is no way that you can cut off a vested right either in that which may be contained in a trust status or an unrestricted right unless there is consent from the owner or unless he has notice of some judicial proceeding?

Mr. FRANCE. I do not believe the Deputy Attorney General's letter goes quite that far, Senator.

Senator BURDICK. I am asking you now.

Mr. FRANCE. It is not my understanding that it does, and I don't believe the constitutional requirements go quite that far either, in my own personal opinion.

Senator BURDICK. Well, is it possible to take title without notice, divest a man of title?

Mr. FRANCE. I believe it can be done without notice. I don't think it can be taken without——

Senator BURDICK. Just compensation.

Mr. FRANCE. Without some reasonable provision for compensation to the former owner.

Senator BURDICK. But it could be done without notice?

Senator CHURCH. Excuse me, Senator.

I would just interject there my own view for what it may be worth, that reasonable procedures for giving notice would probably be required as a part of due process, though actual notice might not be necessary.

Mr. FRANCE. That is just the point I was going to make, Mr. Chairman, that oftentimes even in a condemnation action notice is by publication, and there may not be an actual notice of it received actually by the owner. And some similar proceeding could be set up by the Secretary here, which I believe would meet the requirements of the Constitution.

Senator BURDICK. When I referred to notice I was referring to it in the legal sense, either by actual notice or publication or substituted service. I was referring to that. Now I will clarify it.

Either actual notice or publication or substituted service or something of that sort. It would be impossible to divest the interest of an Indian, whether he had an interest in a trust status or unrestricted

interest, unless he had some type of legal notice. Is that your opinion?

Mr. FRANCE. As a personal opinion, I would agree with you, but I can't think of any authority where the courts have decided that precise point.

Senator ALLOTT. Do you know of any place where you can comply with due process without having either actual or constructive notice? I don't.

Mr. FRANCE. I know of no such instance.

Senator CHURCH. Neither do I.

Mr. FRANCE. I am not saying that could be done. I didn't mean to convey that.

Senator ALLOTT. All right. Thank you.

Senator BURDICK. Then my point is: in order to get at this problem of fractionated interest we have to proceed from the premise that no matter what we do, we will have to provide notice to the holders and owners of those fractionated interests.

Mr. FRANCE. Yes, either actual or constructive.

Senator BURDICK. Thank you.

Senator ALLOTT. I have two or three questions, and these are general.

Both of you gentlemen were here all day yesterday and heard all of the testimony, I believe. Is that correct?

Mr. FRANCE. Yes, sir.

Senator ALLOTT. In your letter of August 9 to the chairman of the full Interior Committee I am concerned about some phases of our own bill, S. 1392, and I am talking more in general than in specific terms, about what the committee hopes to accomplish.

On the first page you quote the provision of the bill:

Unless the Secretary finds that such partition or sale would not be in the best interests of the Indian owners * * *

And that is what the bill says all right, and so reports to Congress.

Now is this specific enough or are there sufficient guidelines in this criteria that the bill becomes meaningful? What are the best interests of the Indian owners, and does this mean all of the Indian owners, or does it mean a majority of them, or what?

Mr. SELLERY. We will take a stab at this, Senator.

Senator ALLOTT. All right. I am looking for guidance. I am not trying to put anybody on the spot.

Mr. SELLERY. I would suggest, first of all, that I would have some doubt as to whether it would be practicable to lay down specific details as to what constitutes the best interests of the Indian owners because I think the factual situations may differ from tribe to tribe, Indians in one tribe and Indians in another tribe. Perhaps the minority status of some of the owners, or the fact that they are all adult. And there is a variety of factual situations, it seems to me, which would be problems to be considered, and I think legislation which spelled this out in considerable detail might impede its successful administration.

If Congress operates on the theory that it is wiser to give the Secretary a reasonable discretion in the administration of legislation, I would be inclined to suggest that this is perhaps better left to his discretion in terms of an Indian owner.

Now, in terms of the question as to whether it should be a majority or one of them or any variation in between, I think what I have said before would be equally applicable. I think he has to weigh this in terms of the complex of the situation as he gets in a particular case.

Senator ALLOTT. You see the problem that is bothering me. We start out at the first of the bill—Do you have the bill in front of you?

Mr. SELLERY. Yes, sir.

Senator ALLOTT. We start out with the request of any owner of an undivided interest. The Secretary is authorized and directed to partition and sell unless the Secretary finds such a partition or sale would not be in the best interests of the Indian owners.

To try and put this in a very simple way, let us assume that there are 100 owners and that one Indian petitioned for a partition. How do you determine—and this is what I am worried about here—what really is meant by the term “in the best interests of the Indian owners”? It might be to the best interests of this one owner to partition. It might be to the best interests of 10 owners to partition. And it might even be to the best interests of 40 Indians to partition. But not necessarily as to the remaining 60. And this is the problem that I am sure the chairman of the subcommittee, who has worked so hard on this, recognizes.

Are you, as a matter of just equity, going to divide the interest of equity on the number of Indians or the number of members of the tribe? Are you going to divide the equities on the basis of private property rights, which I hope this country hasn't given up yet, or how are you going to do it? Do you have any comments on this?

Mr. SELLERY. Well, if you took them solely by the numbers, Senator, you might arrive at one result; if you took it by the proportion of the interests—that is, in the hypothetical situation you pose—you might have one owner who owned 75 percent of the beneficial interest in a particular allotment, and the 99 other owners only owned collectively a 25-percent interest.

It is possible that the Secretary would conclude that the interests of the 99 who only owned one-quarter of an interest ought not to counterbalance the partition or sale at the petition of the owner of the 75 percent of the allotment.

The first question you may wish to consider is whether this should be just on the bare numbers or whether it should be, if you want to try to define this broad rule somewhat, whether it should be based upon a percentage of interest.

Senator ALLOTT. Well, I just voice this thought, that it might be determined as to whether or not the advantage accruing to individual members as distinguished from group members is greater if the sale is made than not. I don't know. This is something that the committee is going to have to consider, and I am not satisfied with the language of the bill in this respect. But I think it is going to take a great deal of discussion to write a historical legislative record here as to what the committee means by this particular language because we had a reference yesterday to the language of the law which permits the Secretary, I believe, to declare the Indians competent, and there has been almost no action under that whatever. We are starting out here to try and do a specific job. If you give it a broad interpretation, it simply means that, even though an individual owner may petition,

somebody may go around in the tribe and circulate a petition and say look what this fellow is trying to do to us, he wants to get out, but the property that he wants to get out is right in the middle of our tribal lands, and what he wants partitioned is right in the middle of our tribal lands. Naturally, he could probably get a lot of signatures perhaps representing even a substantial majority of the remainder, and then the Secretary would almost be forced under this particular language, I am afraid, to say, well, it is to the best interests of the Indian owners that I not partition.

Mr. SELLERY. Well, if he does so he has to report under your bill.

Senator ALLOTT. Yes, he has to report. Now I would like to move over to page 2—

Mr. SELLERY. One further thing. We haven't expressed any views as to whether or not he should be required to report in each instance as this bill would.

Senator ALLOTT. I understand that, and I also understand the point of view that you do not regard either one of these bills as lying within the jurisdiction of your Department, but that you have commented upon them at the request of the committee and of the Director of the Budget.

Mr. SELLERY. That is correct.

Senator ALLOTT. On page 2 of your statement, in the last paragraph, you raise some other questions. Section 10(b) would provide the title to an interest in heirship lands classed by operation of law in a nontrust or unrestricted status unless the Secretary of the Interior determines before the close of an Indian probate proceeding that the Indian heir or devisee is not competent to manage his own business affairs with such reasonable degree of prudence and wisdom and so forth.

Then on page 3, in the middle of the middle paragraph, you talk about competency, and you heard all of the discussion on competency yesterday and also the reference to the statutory authority the Secretary now has to declare Indians competent. As a lawyer do you have any comment that you could make which you think might help clear this up? You have taken the position here, which is a little in reverse of the situation I took yesterday and which I am still prone to maintain, that this would force upon the courts a great amount of litigation. And in the sense that you conceive this, this is true. If they would be forced into court to set aside the decision of the Secretary, and they came in in great numbers, this, of course, would clutter the courts.

However, if you place the basic determination upon the same standard that any other person is placed under, that he is presumed competent until a court of competent jurisdiction declares him incompetent, you would not necessarily clutter up the courts. Would you comment on this?

Mr. SELLERY. If I understand your question correctly, Senator—

Senator ALLOTT. It is not really a question. I have stated the general area, but I would like to have your opinion on it. What is the best way to handle it?

Mr. SELLERY. Generally speaking, I think such matters have been left to the Secretary.

Senator ALLOTT. Well, this has not produced results.

Mr. SELLERY. Well, it has not produced results in connection with the applications for removal of restrictions because the courts have held under the present statute that the application must be made by the Indian and he may not be involuntarily declared competent—

Senator CHURCH. That is true except in the situation of the five tribes where special laws apply.

Mr. SELLERY. Well, there are a number of special laws, as the Senator knows, and it would be impossible to describe the situation except in general terms of the extent of general applicability.

The courts have held they must be on the application of the Indian, and action to make the Indian competent by the Secretary without the consent of the Indian shall not be within the purview of the statute. As to whether the matter should be handled in the Federal courts, the Department is, I think, always concerned about the problem of judicial administration simply due to the fact that the Department has made valiant efforts, it believes, to deal with the general problem of judicial congestion, and this obviously would produce more of the same. And the Department would want the committee to be aware of the fact that it would be adding to the judicial backlog if the matter were to be handled in the district courts.

Senator ALLOTT. You have taken the reverse position, the reverse approach to this matter from that which I took yesterday and that I take now.

Suppose the bill had a presumption of competence. Do you think that Indians would be hammering at the doors of courts all over this country to be declared incompetent?

Mr. SELLERY. To the extent that they are moved by the fact that an administrative or judicial adjudication of their competency or incompetency would affect their tax status under State law, I think it is quite understandable that any Indian—I don't mean to be cynical about it, but it seems to me a perfectly understandable business transaction. If they can minimize their taxes, they will seek to do this. And one of the effects of a decision that an Indian is competent, removal of restrictions in the trust status, is that the land generally speaking thereby becomes subject to State and local real property taxation.

Senator ALLOTT. This is very interesting. I am so far removed from this line of mental reasoning that I think might apply here that I can't understand that anybody would give up their right to govern their own affairs in exchange for a tax benefit although I realize that there are many arrows and straws in the wind that point that way in this area.

Just to move on to one other brief thing, Mr. Sellery, and to go back to the question of notice which Senator Burdick raised, it is my understanding that notice is of significance for purposes of due process only when it precedes an opportunity to be heard in a meaningful way which might affect a decision.

As I read section 7 in the draft bill, the substitute bill, this does not give them an opportunity to be heard, and it really doesn't set up a hearing. "The Secretary shall give actual or constructive notice of any action proposed to be taken under sections 3, 4, and 5 of this act, and shall provide an opportunity for any party in interest to submit written or oral objection to the proposed action."

But it really doesn't give him an opportunity to be heard. He can yell, and that is all he can do.

Mr. SELLERY. I would think that perhaps one reason for the provision in its present form is the fact that if hearings were to be held at a site convenient to the Indian protestants or Indians at interest, the Bureau would be required to recruit itself another force of examiners, hearing officers, to hear this thing.

I think the elements of due process with respect to notice and opportunity to be heard do not require an opportunity to be heard in person.

If you have an opportunity to record your objections to the action, I believe that will comply with——

Senator ALLOTT. May I point out that it doesn't even require that the Secretary can consider these objections. It says he has a right to file them. I think there is a real question of constitutionality from the due process angle in this one respect.

You have here an administrative officer, not a judicial officer, and a judicial officer takes an oath to administer the laws and uphold his duties in accordance with the laws and the Constitution. Of course, the Secretary does, too, but here you don't even have a requirement that he shall consider, in arriving at his decisions under section 7 of the substitute draft H.R. 8077 in the House, you don't even have a requirement that he shall consider this in arriving at his decision. It simply says that a man shall have a right to voice objection.

Mr. SELLERY. Well, I think the bare words permit you to draw that conclusion. I would think the implication of the statute is that he will consider the objections if filed. But, technically speaking, there is certainly nothing in this particular section, I think, which in specific words requires him to consider those objections.

Senator BURDICK. Will the Senator yield?

Senator ALLOTT. I am finished, Senator. I will yield to you.

Thank you, sir.

Senator BURDICK. The Senator from Colorado picked on a point that I was going to pursue, too. Do you feel that there are any constitutional objections to permitting the Secretary to exercise the judicial functions in making oral petition?

Mr. FRANCE. No, sir.

Senator BURDICK. Suppose that an owner of an undivided interest comes in and asks the Secretary to start a partition action, and suppose that an adverse claimant to this interest appears, and suppose that the Secretary partitions in favor of the original petitioner. What rights does the adverse holder have by way of an appeal?

Mr. FRANCE. Are you talking about the Interior substitute draft now?

Senator BURDICK. I am talking about S. 1392.

Mr. FRANCE. I don't believe either draft provides any appeal. Consequently, the only appeal that would be available at all would be for the owner to go into court and test whether or not the Secretary had exceeded his authority in granting the partition.

Senator BURDICK. Let us assume now the Secretary follows the legislation in every detail, and that the legislation does not provide for appeal. Wouldn't that be denial of due process to an adverse claimant?

Mr. FRANCE. No, I don't think so.

Senator BURDICK. Suppose that individual owner A comes in and asks for a partition. B comes in and claims I have a right to that allotment. The Secretary holds for A. Doesn't B have any recourse?

Mr. FRANCE. Senator Burdick, if I understand your problem, you will probably have a procedural setup over in the Department of the Interior a little different than you assume. Probably in the first instance this matter will be handled by someone in the Bureau of Indian Affairs, and the ruling in the first instance will be made there. I would assume, under the usual departmental procedure, the losing party in the Bureau of Indian Affairs would have a right of appeal to the Secretary of the Interior. That would be the usual procedure over there, and he would get his case heard on an appeal to the Secretary.

On the other hand, if the Secretary decided that he wanted to hear the matter himself in the first instance rather than have it come up on appeal, I don't think that would raise any constitutional question.

Senator CHURCH. May I suggest that perhaps the reason is that no statutory appeal needs to be provided inasmuch as the complaining party or the aggrieved party always has access to the courts where he contends that the Secretary has exceeded his lawful authority, or where he contends that he has been denied a constitutional right. So there is, in that sense, a right of appeal that the statute does not have to provide.

Senator BURDICK. There is a difference between exercising constitutional rights and a question of disagreeing with the decision.

Senator CHURCH. That is right, but the question raised is one of due process, and I think due process is given because there is always the right of access to the courts if one contends he has been denied a constitutional right.

Senator BURDICK. All I am trying to do is find a legal basis for this problem.

Is it your opinion that the Secretary of the Interior can cut off the right of B in favor of A without any further judicial determination, without meeting any constitutional objection?

Mr. FRANCE. If authorized by Congress, yes, sir.

Senator BURDICK. OK. That is all.

Senator ALLOTT. There is one other thing I would like to ask, Mr. Chairman, if I may.

You heard the extensive discussion yesterday on various phases of the bidding and the responsibilities of the Government as a trustee. And I am sure you also heard the statement by the General Accounting Office. Do you agree with the statement of the General Accounting Office in this respect as given yesterday?

Mr. SELLERY. My recollection of the General Accounting Office statement was that it dealt largely with the facts, and that, in terms of the bidding process, I don't recall that they made a recommendation, sir.

Senator ALLOTT. Well, maybe I can turn to it quickly here.

Well, this is a rather lengthy letter, and my eyes don't happen to fall on it, but my recollection is that the GAO said yesterday in their statement that they did not think that the sale by the trustee, the Fed-

eral Government acting as trustee, to a tribe at the appraised value and foreclosing any opportunity for higher bids constituted a fulfillment of the obligations of the trustee.

Mr. SELLERY. I think the Senator may be referring to the paragraph or the subparagraph No. 1 on page 8 of the General Accounting Office statement.

Senator ALLOTT. Well, I will tell you, the reason I can't find it, I was looking at his letter and I didn't have the statement before me.

Yes, subparagraph 1. And I think they touch on it in the first two, as a matter of fact. Do you agree with these?

Mr. SELLERY. I think it depends upon the approach you take, Senator. The just compensation provision of the fifth amendment is applicable, of course, in the eminent domain type of decision. It requires that the owner be given just compensation, which the courts have held, loosely speaking, to be the fair market value.

In the case of the Department's trust responsibilities I think you may there have a policy question as to whether or not you wish to go further than the Constitution itself would require you to go, or to analogies to just compensation types of—

Senator ALLOTT. Where is there a policy decision when you are talking about trust laws? The trust laws of this country are pretty well established in every State of the Union. Where do you get policy? You are either fulfilling the obligation of the trust or you are not fulfilling it. What does policy have to do with it?

Mr. SELLERY. Well, the basis for the view that the United States has a trust responsibility or relationship to the Indian is an old one, and I do not know whether it is based precisely upon analogies of trust law or whether it is merely an effort to separate legal and equitable title.

If you have satisfied the constitutional requirements, I think the administration as prescribed by Congress of the trust responsibility is an entirely separate question.

Senator ALLOTT. Well, this No. 1 says:

Tribes, instead of the owners, are given preferential rights to buy certain lands in heirship status, and would be able to acquire such lands at the appraised fair market value.

This does not mean the fair market value. The appraised fair market value which would not necessarily assure the owners of the highest possible price.

These provisions appear to be inconsistent with the Department's trust responsibility.

When you take these words and you interpolate them into the situation the Federal Government had with the Menominee Indians where they paid an \$8.5 million judgment to the Menominee Indians because we were accused of not operating their forest lands in the best possible manner, how can it possibly be said that when you throw this property, which belongs to an individual for sale, on the market at less than the most you can get for it that you are not violating your trust responsibility? I can't see where policy can come into this. You are dissipating assets.

Mr. SELLERY. I don't think you are dissipating assets, Senator. You may not conceivably be getting the maximum that it is possible to get for it, but you are not dissipating.

Senator ALLOTT. If you don't get the most you can when you sell trust property for the beneficiaries in trust, you are dissipating assets, are you not?

Mr. SELLERY. I wouldn't agree with that, sir.

Senator ALLOTT. How can you avoid it?

Mr. SELLERY. You have not dissipated the assets. You may not have gotten all for them that is possible to get, but you haven't dissipated them.

Senator ALLOTT. All right, you have three pieces of property that are worth \$100,000, at the fair market value. You sell one of these at the appraised fair market value—is the words they use—at \$80,000. Therefore, you have dissipated the assets because you end up with two pieces of property worth \$100,000 apiece, and you end up with \$80,000 in cash instead of the \$100,000 in cash you should have ended up with on the third piece of property. You have dissipated the assets.

Mr. SELLERY. Well, in the Senator's sense that is correct.

Senator ALLOTT. Well, I assume then that you don't wish to either endorse or comment positively on either section 1 or 2 on page 8 of the GAO statement, either for or against?

Mr. FRANCE. Senator Allott, with respect to your question as to whether I would agree with paragraphs 1 and 2, I probably would agree with paragraph 2. I would have some hesitation about paragraph 1.

Senator ALLOTT. Why?

Mr. FRANCE. Because I disagree with your statement that the United States has no policy matters in dealing with Indians. The courts have held their the trust or guardianship relationship between the United States and the Indian is not a true trust or guardianship but that the terms are those to be prescribed by Congress, and I think in prescribing the terms of the trust the Congress can, and for 100 years has exercised a definite policy determination.

Senator ALLOTT. If you have a definite policy determination by Congress, yes, but in the handling and disposition of property there is just one question here, and that is that the proposed substitute bill would give the power to the Secretary to sell property at less than the fair market value.

Mr. FRANCE. I do not interpret the bill that way Senator Allott.

Senator ALLOTT. Well, it says that it can be sold to the tribe for the appraised value, not the fair market value.

Mr. FRANCE. Well, I would assume that appraised value would be substantially the same as fair market value. If not, then, of course, I would agree with your statement that the Secretary doesn't have authority to dispose of it at something less than fair market value as determined in a reasonable manner.

Senator ALLOTT. That is all I have.

Senator CHURCH. Thank you very much, gentlemen.

Senator BURDICK. I have one more legal milepost to pass.

Getting back to my illustration, suppose that the individual owner who makes the application for partition is an Indian and has a restricted right. And assume that the diversity is brought about by the fact that an interest is owned by a non-Indian who has a nonrestricted right to this property. Do you believe the Secretary of the Interior

could litigate the matter without violating any rights of the non-Indian?

Mr. FRANCE. No, sir.

Senator BURDICK. He couldn't?

Mr. FRANCE. It is my personal view that he could not. There may be some difference of opinion with some people on that, but it is my personal view that he could not.

Senator BURDICK. In other words, this section would only grant partition in case all the owners of the interest were Indians?

Mr. FRANCE. Or they got the consent of the non-Indians.

Senator BURDICK. That is right. In other words, you wouldn't clear up a piece of property then where we have a non-Indian with an unrestricted right without his consent?

Mr. FRANCE. It is my opinion, sir, that that could not be done.

Senator BURDICK. Thank you.

Senator CHURCH. Thank you very much, gentlemen.

Senator CHURCH. Our next witness is Mr. Paul Jones, the chairman of the Navajo Tribal Council.

Mr. Jones, we are very pleased to welcome you.

STATEMENT OF PAUL JONES, CHAIRMAN, NAVAJO TRIBAL COUNCIL

Mr. JONES. Thank you, Mr. Chairman.

Mr. Chairman, I would like to display a map showing the allotments of our Navajos outside the reservation property.¹

First of all, Mr. Chairman and members of the committee, I would like to give you a brief explanation of the map.

This portion of the white part of the map is the general reservation which is only partially shown, which consists of about 16 million acres.

This [indicating] is outside the reservation allotments of our Navajo people in the State of New Mexico.

This [indicating] is what we call the Ramah area which is now near the Navajo Reservation.

This one [indicating] is the Canonicito, which is west of Albuquerque about 30 miles.

And this [indicating] was the Alamo near Magdalena, N. Mex., also south of Canonicito.

These numbers indicate here the numbers of our community living areas. Here we have 196. And in between are the non-Indians living there.

These white areas represent the non-Indians living within these allotments of the Navajo people.

Senator ALLOTT. Mr. Jones, will you repeat that last again. I didn't quite understand you. What does the white represent?

Mr. JONES. These white areas in here are occupied by non-Indians, the white ranchers who may have leased a portion of the reservation. I mean the allotment of the Indians here, to make it worthwhile to operate a ranch, and so that it will be large enough to make it worthwhile for him to raise some stock.

¹ The map referred to is in the committee files.

Here [indicating] is a big area in which we have an allotment, but mostly occupied by the white ranchers. But these all are Indians living off the reservation proper on allotments mostly of 160 acres in size.

Mr. Chairman, members of the committee, there are 4,185 recorded allotments to Navajos. Practically all are of 160 acres in size. Approximately 3,600 thereof are of lands in western and northwestern New Mexico, outside of the Navajo Reservation. They form a check-board pattern and are interspersed with Federal, State, and privately owned lands. The remainder of the Navajo allotments are of lands lying within the reservation boundary. Most of the allotments were issued before 1930. Half or more of them have been probated. The Bureau's records indicate the average number of heirs established in the probate cases is 4.5 persons. One of the probate cases shows 84 heirs.

I am informed by the area director that extreme difficulties have been encountered in the probate proceedings, particularly those involving lands outside the reservation. Communication with the heirs resident on the reservation is difficult. The land value is very low and there is little, if any, incentive for any of the heirs to incur the expense necessarily involved in establishing his interest. As time passes and the number of heirs increases, this phase of the problem will become even more aggravated and in the near future will become even more complex. The area director informs me that it will be extremely difficult to obtain requisite signatures of all of the rightful owners in order to effect a sale of the fractionated allotments.

As will be readily seen from the foregoing, the complex problems resulting from the fractionation of the allotments, both within and without the reservation are very difficult of analysis and, consequently, of solution. I seriously doubt that any plan can or will be formulated that will please all of the interests affected or which will entirely overcome the difficulties attendant upon efforts to convert these broken interests into economic units.

The Navajo Tribe is deeply appreciative of the considerate attention which this committee and the Interior and Insular Affairs Committee of the House have always given to the problems of the Indian people, and I am reluctant to criticize any effort made to solve our problems. I feel, however, that I would be derelict in my duty to my people if I did not register their opposition to S. 1392 as it is presently framed.

It is probable that the bill in its present form would obliterate the fractionization, but in doing so it disregards the interests and estate enjoyed by the Indian allottees, and in many instances comprehended by the bill makes it so difficult for the Indian to protect his interest in the land in trust status as to render it worthless. The bill more or less summarily takes away the protection of the trust estate which most Navajos must have in order to preserve this meager asset. In most cases it constitutes his principal estate.

As to section 1, the difference which this section provides in the character of finding required by the Secretary respecting the surface and the mineral estate does not seem justified. Partition of the surface is conditioned on a finding as to the "best interests of the Indian owners" whereas reservation of the mineral estate must be made in fee status unless the Secretary makes the determination referred to

in subsection 10(b) which relates solely to the competency of the Indian owner.

Preservation of the trust status of the mineral estate in the lands in which the Navajos have an interest is far more important than the surface estate which is of little value.

As to section 4, in the last Congress this body passed S. 2878 which, had it become law, would have enabled the Navajo Tribe to consolidate approximately half of the allotments affected by S. 1392 with Navajo-owned land.

I would like to break in with an explanation of the map again.

Mr. Chairman, that includes a good portion of those white areas of the land that I referred to that would have been included and transferred to make that a good solid area for the Navajos had this bill been made law. So I want to refer back to that at this time.

The Navajo Tribe, by resolution, offered to accept the 248,000 acres of marginal lands covered by S. 2878 in fee. Difficulties were encountered in the House committee considering that bill. Efforts are being made to exact payment of compensation to the Government for some of the lands in addition to the assumption of the burdens of fee ownership. The fate of that measure is at the moment uncertain.

The committee will recall that the Navajo Tribe has on numerous occasions declared its willingness and desire to pay its own way to the limit of its ability. The tribe cannot, however, be expected to apply its limited capital, though sufficient for the purpose, to long-term investments such as are contemplated by S. 1392 in low-value grazing lands, producing less than subsistence income in order to assist in the maintenance of the economic stability of a limited portion of the tribal membership.

The tribe is presently advancing a comprehensive plan for the improvement of the reservation lands and for the general benefit and improvement of the economic status of the entire tribal membership. Two of the basic programs are the development of the natural resources of the tribe and the creation of job opportunities for the people to take them gradually but as rapidly as possible out of the grazing business. We have been many times complimented by highly placed officials of the Department of the Interior and of this body for these efforts. I hope that these expressions of approval were genuine.

Section 4 is designed to defeat the trust status of lands acquired by the tribe except those within the reservation boundaries. So long as we are compelled to consider them as isolated tracts, their acquisition in fee does not appear to be very inviting.

As to section 5, this section is particularly objectionable. It seems, though I am certain such was not the intent, to penalize the Navajo Tribe. The loans provided for could only be made to those tribes which do not have sufficient funds available to make the purchase.

As indicated above, the Navajo Tribe has sufficient funds to purchase all of the allotments, but it has other greater and more pressing needs for the use of that money than the salvage of fractionated trust allotments.

I do not believe any of the Indian tribes would pay more for the allotted land than its appraised value. Certainly the Navajo Tribe would not. Why then should the tribes be required to offer any other security for the loan than a mortgage on the land acquired?

If the yield of the purchased land is not expected to be sufficient to retire the loan, how could the Secretary of the Interior, as guardian of the Indians and the trustee of their property and their assets, countenance the use of tribal funds for the purchase in the first instance?

This section prohibits a mortgage loan unless the Secretary approves a master plan for the use of all lands purchased. Our experience with master plans has not been generally satisfactory, and since this section also requires that the master plan may not be approved by the Secretary until it has been agreed to by a majority of the adult tribal members both on and off the reservation, it becomes in my opinion burdensome and unworkable.

Our records indicate that the cost of holding a tribal election on the Navajo Reservation is in excess of \$40,000. To require a referendum to support a master plan, including the vote of all of the adult members of the Navajo Tribe who reside off the reservation, would make it even more expensive and make the program contemplated by this act even less attractive.

The Navajo Tribe is governed by the Navajo Tribal Council consisting of 74 members elected by the Navajo people. Among others, the council has the power to authorize the purchase of property and to appropriate tribal funds for such purposes. It would seem to me if any approval is required to be made of a master plan, the approval of the Navajo Tribal Council should and ought to be sufficient for the purpose.

In addition to the foregoing, this section offers no assurance that the Navajo Tribe would even be eligible for a loan. I will discuss this problem in connection with section 9.

As to section 7, whatever form the bill may ultimately take, I hope this section will be eliminated. The frequently recurring expressions of the desire of Members of the Congress and highly placed officers of the executive department to expedite termination of the Federal trust responsibilities and wardship has already had a demoralizing effect upon the Indians. They have become uncertain of the attitude of the Government, and since the section does not, in my opinion, serve any useful purpose in this statute, I recommend that it be eliminated.

The tribal purchases authorized by the act of lands outside the reservation are required to be in fee. Therefore, the termination of the Federal trust responsibility would not have any effect upon such lands. In addition, I had not thought that the Secretary of the Interior had the power to prescribe, restrict, or control the legislative power of the Congress, which includes the power of termination.

As to section 9, this section authorizes loans from the revolving fund authorized by the act of June 18, 1934, 48 Stat. 986, to those tribes "having a form of organization that is satisfactory to the Secretary."

Since the Navajo Tribe by referendum vote of its members refused organization under this act, we have no assurances that the Navajo Tribe will be eligible for a loan as authorized therein.

While our recent history shows that the Navajos are perhaps the best organized Indian tribe in the United States, we have no assurance that our form of government is "satisfactory to the Secretary."

The discretionary power given the Secretary in this section to require tribal organization satisfactory to him rather than to the tribes

does not seem to me to be compatible with the long-established policy of permitting and encouraging the tribes to exercise the powers of local self-government and regulation of their internal affairs.

As to section 10, this section seems to me to be highly prejudicial to the majority of the Indian allottees and particularly to their heirs at law. The section is in effect a statute of descent and distribution insofar as it relates to the estate taken by the heir. It is self-executing except upon a condition; that is, a determination by the Secretary as to the competency of the heir or devisee. This results in a very uncertain and insecure tenure.

Viewed in its entirety and particularly with reference to this section, the act does not seem well designed to accomplish the purpose we hope the committee has in mind. It would, I think, be far more realistic to phrase the condition upon which the trust status could be removed in the converse or opposite way; that is to say, let the act provide that the lands transferred, either by operation of law or by agreement, shall pass to the heir or transferee in like status as it then is unless the Secretary shall upon application of the Indian heir, devisee, or transferee hereof determine two issues: (1) the best interest of the Indian, and (2) his competency to manage his affairs and property, if it should be freed of the trust. When this determination is made, the estate may change as the Indian wishes.

On April 14 of this year the General Superintendent of the Navajo Agency and the area director, in reporting upon this problem, stated:

Based on our personal experiences with the Navajo allottees over the past 30 or more years, we can state without equivocation that at least 90 percent of all Navajo allottees and their current descendants lack the ability, knowledge, experience, and judgment to manage their own business affairs with such reasonable degree of prudence and wisdom as will be apt to prevent them from losing their property or the benefits thereof.

If I am correctly informed that at least half of the 4,185 allotments to Navajos have already passed through probate and that the average number of heirs is 4.5 persons, then to give even colorable compliance to the condition respecting change in estate under S. 1392, approximately 12,000 determinations would have to be made by the Secretary and reported upon annually. The number would increase each year as additional properties are probated.

If it be that less than 10 percent of the Navajos holding present interests in allotments are competent, then my suggestion would require only 1,200 such determinations to be made instead of 12,000, even assuming that all of the Navajos the Bureau considers competent requested such a determination.

If the burden of administering Indian allotments is as heavy as has been represented—and I do not dispute it—the better legislative practice would seem to be to prescribe a course requiring the least amount of work rather than the maximum, provided, of course, the same result would obtain.

I am fearful that if the additional burden prescribed in the bill is cast upon the Secretary, his determination of competency and of the best interest of the Indians affected will not be made with anything like or even approaching that degree of careful consideration and certainty of judgment which every American is entitled to have exercised before his interest in property or the character of the estate which he

takes and holds, whether passing to him by operation of law or otherwise, is made.

In its present form the bill creates a situation as unsatisfactory to the Indians as that which it seeks to correct. It opens the way to bureaucratic neglect and arbitrary handling of the property rights of the Indian wards of the Government.

Senator CHURCH. Thank you very much, Mr. Jones. I think you have raised some points here in connection with the bill that the committee will want to take into very serious consideration.

The purpose of these hearings, as you know, is to thoroughly air this proposal and the substitute proposal with a view of making such changes as seem to be in the best interests of the Indian people, and to make the bill as workable as possible, and I think you have made some very constructive suggestions that we will take into very serious consideration.

I want to thank you for your testimony.

Mr. JONES. May I just make one more statement.

The allotment, as I referred to it, has a very low surface value, but, aside from that, that is the only home that he has, and certainly we cannot and should not take an Indian home away from him by law. And should the tribe be required to purchase that home away from him, he has to live somewhere.

My recollection is that we can spend the tribal money to purchase those things that are required, but we have to get that money back into the tribe somewhere, and these poor Indians in the present status are unable to repay any money even though they made their home. They are living on a subsistence income from which they cannot be expected to pay the rent that will be necessary when this land gets to be in fee status.

Senator CHURCH. I want to assure you, Mr. Jones—and I think I can speak for the other members of the subcommittee—that I can see no likelihood that this subcommittee will report out a bill that would require the Indian tribe to purchase allotted lands. Regardless of what the procedures are that ultimately will be approved by the subcommittee, there will be no requirement upon any Indian tribe that it buy. This will be left entirely to the discretion of the tribe in every case.

Mr. JONES. Thank you.

Senator BURDICK. Mr. Chairman.

Senator CHURCH. Senator Burdick.

Senator BURDICK. Mr. Jones, do you recognize this problem of fractionated interest to be a serious problem in your area?

Mr. JONES. I certainly do.

Senator BURDICK. Briefly, could you tell me how you think we ought to handle it?

Mr. JONES. I have already said that I have no solution in my statement, and I hope that whatever effort may be promulgated will not be too cumbersome or a hardship on any tribe, particularly my tribe, as I have illustrated to you the lay of our allotments outside the Navajo Reservation.

Senator BURDICK. I understand we have got the problem. I am trying to find the answer.

Mr. JONES. I don't have one.

Senator BURDICK. That is all. Thank you.

Senator CHURCH. Thank you.

Our next witness is Mr. Lawrence Lindley, a representative of the Indian Rights Association, of Philadelphia.

All right, go ahead, Mr. Lindley, with your statement.

**STATEMENT OF LAWRENCE B. LINDLEY, GENERAL SECRETARY,
INDIAN RIGHTS ASSOCIATION, PHILADELPHIA, PA.**

Mr. LINDLEY. I want to express appreciation for the opportunity of appearing before the committee.

The Indian Rights Association wishes to record the support of both the statement of principles of the Interior Department in its report on S. 1392 and also the purposes of H.R. 8077, 87th Congress, to which you referred yesterday.

The heirship land problem is very real and one of the most important facing Indians and the Indian Service at the present time.

This problem stems directly from the allotment policy. Admirable as were the objectives of individual allotment, the results have generally been disappointing and often most tragic. A policy expected to help Indians retain and make better use of their land has often resulted in the title becoming so complicated that the land could not be used. In many cases it actually passed into non-Indian ownership as the only method of settling estates.

With the death of original allottees, and in many cases their heirs of one or more generations, the inheritance process has resulted in thousands of tracts of Indian land, totaling millions of acres, passing into multiple ownership. The number of tracts with so many owners that sale or lease is nearly impossible is increasing rapidly.

It is very important that the policy stated by the Interior Department with regard to the use and management of Indian trust and restricted lands be kept constantly to the fore. This policy is "to use the lands productively for the support and advancement of the Indian beneficiaries." A solution to the heirship land problem to be truly helpful "will allow the land to be used by the Indians to the maximum extent feasible."

Over the years efforts to solve the heirship land problem, with some notable exceptions, have generally resulted in the land passing out of Indian ownership because none of the heirs in question, nor the tribe, had funds to buy out the shareholders.

If I might just add there in addition to what I had written, the thing that has happened to Indians over the years is very unfortunate indeed, in that they have lost very, very much land. When efforts were made to settle estates it seemed that the only way to do it was for the land to be sold. At times competency commissions were set up to free Indians from the restrictions that they held, and I think that the result almost inevitably and almost invariably has been that Indians declared competent in the sense that they were given a fee patent for their land in the place of a trust patent lost it. It went entirely out of Indian ownership into non-Indian ownership. That, it seems to me, is something very important for us to keep in mind in connection with the consideration of any method of trying to work out this very serious heirship land problem.

H.R. 8077 provides that lands, where the multiple ownership prevents productive use, may be sold to the tribe where it is located without the consent of any of the owners. Sale would be at an appraised fair market value, payment to be made in installments over a period of years out of income from the use of the land. This seems to be a promising method for attacking some of the most acute heirship land problems. That is a way in which land could be kept in Indian ownership.

A similar authority would be given the Secretary with regard to the execution of leases, timber sales or grants of right-of-way of land in such multiple ownership as interferes with effective use of the land.

Other provisions of H.R. 8077 seem to give greater protection to the Indian community than do the provisions of S. 1392:

1. The provision for administrative sale or partition of heirship land upon application of a majority ownership rather than upon the application of one shareholder as provided in S. 1392.

2. The administrative partition or sale must be in the best interests of the Indian owners and not detrimental to the local Indian community. I would emphasize that it should not be detrimental to the local Indian community.

3. The tribe is given a preferred right to purchase the land at its appraised value.

May I emphasize again our agreement with the fundamental principle of the H.R. 8077, "to use the lands productively for the support and advancement of the Indian beneficiaries."

In contrast, the basic principle of S. 1392 seems to be aimed at the termination of all Federal responsibility for the protection of Indian land holdings as rapidly as possible.

It could be further emphasized that the heirship land problem was in no sense created by the Indian people. It grew directly out of the allotment policy and Indians were generally opposed to allotment.

The land owned or under the control of Indians is much less than needed to support the Indian people who would like to gain their livelihood from the land. Everything possible should be done to build up the Indian land holdings and to help them use their land for the greatest possible benefit to their tribes and themselves.

That concludes my statement, Mr. Chairman.

Senator CHURCH. Thank you very much. We appreciate having your statement, and you may be sure that your views will be carefully considered by the committee.

Senator BURDICK. Mr. Chairman, I would like to ask the witness one question.

I notice in your recommendations that you believe a majority ownership rather than one shareholder should make the application under S. 1392. Where there has been a great deal of fractionation don't you think in many cases a majority might be very difficult to get?

Mr. LINDLEY. I suppose that is possible. Possibly where there are a great many fractionations it might be well to consider a 25-percent ownership such as Senator Case has suggested.

I believe perhaps that in one of his bills he suggested a sliding scale, that if there were so many owners, that it be 50 percent; that if there were a good many more, that it might be 25 percent, and so on. Possibly something of that sort would be better. It seems, though, a

little bit risky to leave it to one, to the application, it seems to me, of just one owner of a share.

Senator BURDICK. Thank you.

Mr. LINDLEY. Thank you.

Senator CHURCH. Our next witness is Mr. Richard Schifter, attorney at law in Washington. Mr. Schifter represents several Indian tribes.

Mr. Schifter, we are pleased to have you here this morning.

STATEMENT OF RICHARD SCHIFTER, ATTORNEY, WASHINGTON, D.C., ON BEHALF OF THE OGLALA SIOUX TRIBE, THE NEZ PERCE TRIBE, AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Mr. SCHIFTER. Mr. Chairman, my name is Richard Schifter. I am an attorney with offices at 1700 K Street NW., in Washington, D.C. I am testifying on behalf of the Nez Perce Tribe of Idaho, the Oglala Sioux Tribe of South Dakota, and the Association on American Indian Affairs.

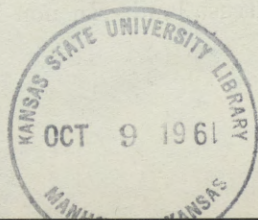
At the outset I would like to congratulate the committee and its staff at the excellent job done in its survey of the heirship problem. The report contains a great deal of relevant data and can serve as an excellent foundation for the framing of effective and beneficial heirship legislation.

With regard to the two proposals before the committee today, S. 1392 and the administration substitute, I speak on behalf of the Nez Perce, the Oglala Sioux and the association in asking you to act unfavorably on S. 1392, and I speak on behalf of the Oglala Sioux and the association in asking you to support the principle of the administration substitute. The Nez Perce are still studying the latter document.

I should add at this time, speaking particularly on behalf of the Nez Perce Tribe, that we have the highest regard for Senator Church, who has at all times exhibited his interest in and concern with the welfare of the Nez Perce Indians as well as other tribes. Both in introducing S. 1392 and in his remarks yesterday the Senator emphasized that the bill was merely "a vehicle for the purpose of exploring further the viewpoints and wishes of the people most affected by the heirship problem." It is with that purpose in mind that we are offering our comments and suggestions.

Before considering solutions I would like to state the problem as it appears to me. I would agree with the committee that the problem before us is, by and large, not one of land use. I would agree that the problem is basically one of the expenditure of perhaps \$1 million annually of Federal funds for economically unjustifiable bookkeeping transactions, which in some instances grind out such absurd results as the 7-cent check of which Congressman Berry spoke. It must also be recognized that the problem is getting worse by geometric progression.

I would like to add here, Mr. Chairman, that we ought to recognize that some of the horrors represented here yesterday are not really typical of the situation. I am not going to minimize it, but they are not that typical.



In looking for a solution to this problem it is vitally important that the Congress do not select a cure which is worse than the disease, which will ultimately cost the Federal Government and the States more than is now spent on wasteful bookkeeping.

Of necessity, any proposal to solve the heirship problem bears a direct relationship to the overall problem of Indian administration. I would most respectfully urge this committee to approach the heirship issue in the light of the basic policy approach enunciated by former Secretary Seaton in 1958, espoused by both presidential candidates in the 1960 election and now clearly adopted by the present administration. This approach suggests that Indian communities be recognized as depressed communities, lacking in capital and skills, and that they receive economic assistance similar in character to that received by other depressed areas in the United States and by underdeveloped nations abroad.

If the problem of Indian reservations is to be approached in a logical, systematic manner with a comprehensive plan for economic improvement, we can set down one cardinal rule to be followed—let us not waste any capital assets.

Land constitutes such a capital asset, often the only asset of Indian communities.

There is no doubt that land alone cannot solve the economic problems of Indian tribes. However, in conjunction with other economic enterprises—and the Bureau of Indian Affairs, Mr. Chairman, is really working hard on developing these other opportunities—it can help make reservation economies viable. And when I speak of the economic contribution which land can make to an Indian community I do not mean land leased to outsiders. I mean land utilized by the Indians themselves.

The experience of the last decade has demonstrated that the free sale of land and the dissipation of the proceeds has weakened the economies of Indian tribes and has at the same time substantially increased the problems and costs of the Federal Government and of the States in which the land sales took place.

Land, I submit, should be considered one of the building blocks of reservation economies, to be dispensed with only if a determination is made, in the case of a particular reservation area, that under the special circumstances of the locality it would not serve any useful economic purpose if retained in Indian ownership. No legislation should be enacted which could lead to indiscriminate, large-scale dissipation of Indian capital assets.

Approaching the proposed legislation with the foregoing thoughts in mind, we find that while both S. 1392 and the administration substitute provide for the simplification of existing patterns of fractionated heirship, the latter contains adequate safeguards against the loss of land to Indian communities which the former lacks.

The following are the principal difficulties presented by S. 1392:

1. S. 1392 would permit a single owner of an heirship interest to file a petition for sale. This, to be sure, is comparable to the provisions of our general law. However, I am sure that the committee will agree that nowhere in our non-Indian real property holdings do we run into such minute undivided interests as we do in the case of Indian trust land. In non-Indian situations every owner who may want a

partition will have a substantial interest in the land. There is no practical parallel in non-Indian real property situations for the grant to the holder of a single, minute interest in land of the right to force a sale. Such sale could have the following detrimental effects:

(a) It could cause a large number of tracts to be offered simultaneously, thus depressing the price received by any individual.

May I say, Mr. Chairman, there was a great deal of discussion here about the question of trusteeship responsibilities, and it seems to me that is one of the greatest problems created by S. 1392. In some reservations you might be offering half the reservation for sale at the same time, and the result of that would be that you are depressing the price much more than you will get as a result of this discussion yesterday and today, too, of the purchases at the appraised price.

Senator CHURCH. I think you make a point that we must take full account of when you raise these objections to permitting one individual owner to initiate this action. I think you make a case here. But don't you presume too much when you say that the Secretary would administer this act in such a way as to put upon the market all at once such large portions of land knowing full well that the effect of such management would be depressed price? Don't you think the Indian Bureau would administer the act with more ability than that?

Mr. SCHIFTER. Well, Mr. Chairman, it presents a serious problem. First of all, you can never tell when you draft a law as to exactly who is going to be Secretary of the Interior to carry it out. And you never can be absolutely certain of it.

Senator CHURCH. But you have to, if you are going to have any kind of meaningful legislation at all, presume that the administrators are going to act with reasonable prudence.

Mr. SCHIFTER. I would say this, Mr. Chairman, that the implication of this bill—and I will discuss that later with regard to another section—is that, if in doubt, the Secretary ought to grant the partition. This is the way this bill reads to me.

Senator CHURCH. Well, with respect to any particular piece of land that may be sold, I can't find in it any reasonable ground to support the contention that vast tracts would be dumped upon the market by the Secretary by virtue of the provisions of the bill. I think that goes too far.

Mr. SCHIFTER. I would just say this, Mr. Chairman, that I want to be certainly fair in my analysis. I think the pressure that would be building up under this bill for sale is going to have a depressing effect even if the Secretary is going to stagger it over a period of years.

The fact that you know there is this great pressure for land sale backing up behind any particular sale that is going on at any particular time is definitely going to have a depressing effect on the price.

I think there is just no doubt about that.

Going on with this, yet, the large number of tracts becoming available for purchase would make it practically impossible for much of the land to be retained in Indian ownership.

(b) It could upset a use pattern worked out by a majority of the heirs under which one or more heirs might be residing on the land. In case of a sale, these heirs would be made homeless. And there are a great many arrangements, Mr. Chairman, on Indian reservations

today among the heirs under which somebody actually is using it, and this is another very serious problem, I think, that the committee will have to consider.

(c) Withdrawal of a tract from Indian ownership can upset such land-use arrangements as grazing units to the detriment of dozens of owners of land in the same unit as well as the land user.

Perhaps someone might think that owners of minute interests might not consider it worth their while to petition for sale. What should be kept in mind is that land speculators would find it both profitable and worthwhile to seek out owners of small interests and offer them sufficient inducements to file land sale petitions. And I am speaking, Mr. Chairman, on the basis of the kind of thing that is going on today.

It stands to reason that the owner of a \$5 or \$10 interest in a tract of land might respond favorably to the offer of, let us say, a \$25 fee to be earned by filing a land sale petition.

Senator CHURCH. Do you think these objections that you raise would be cured if the committee were to adopt a majority rule? That is to say, if the committee were to require the majority of the Indian owners with a majority interest in a given piece of land for the action to be initiated and then make it subject to the approval of the Secretary based upon both the interest of the owners and the interest of the tribe also?

Mr. SCHIFTER. Definitely, Mr. Chairman. As a matter of fact, this is the recommendation that I would want to make.

Senator CHURCH. Yes.

Mr. SCHIFTER. (2) S. 1392 requires the Secretary of the Interior to grant a petition for sale unless he finds that sale would not be in the best interest of the owners. Each such finding is to be reported to Congress. The implication that the Secretary is to resolve doubts in favor of granting the petition is clear.

What is particularly significant is that under S. 1392 the Secretary has no opportunity to prevent a sale which would upset an existing land-use pattern where, for example, the tract is a key tract in an Indian-operated grazing unit.

(3) While some tracts might be bought by individual Indians, it must be recognized that the passing of the bulk of the land out of Indian ownership can be prevented only by tribal purchases.

Tribes possess, under existing law, authority to make land purchases. The Secretary of the Interior possesses under existing law authority to make loans to Indian tribes for land purchases. No legislation is needed on this subject other than legislation to increase the authorization for the Indian revolving loan fund. S. 1540, which has already passed the Senate, dealt with that subject.

While S. 1392 creates a great need for tribal ability to purchase land, section 5 of the bill serves only to restrict existing authority. Its principal flaws are:

(a) It fixes the maximum loan term at 25 years;

(b) It establishes an interest rate which at present would run at approximately $4\frac{1}{2}$ percent or perhaps even higher, Mr. Chairman.

I checked with the Federal Reserve bank on that; 4.8 percent was the possible maximum figure given to me. And I may say in some areas this would result in a net loss in the land purchase program

because, for example, I am familiar with the Sioux of South Dakota. The profit, the initial profit they can make on it is 3 percent approximately, and I may say also that the Bureau of Indian Affairs has just yesterday changed the interest rate to 2 percent.

(c) It requires approval of any land consolidation——

Senator CHURCH. For purposes of the record, the interest rate had been altered by the Indian Bureau from what to what?

Mr. SCHIFTER. On loans of that type from $4\frac{1}{2}$ to 2 percent.

Senator CHURCH. From $4\frac{1}{2}$ to 2.

Mr. SCHIFTER. That is right. It requires approval of any land consolidation plan preliminary to a loan by referendum of both on- and off-reservation members of the tribe.

The first two of the foregoing provisions would substitute rigid statutory requirements for present administrative flexibility. These proposed new standards are far tougher than those imposed by Congress on other lending programs which it considers economically desirable. In view of the substantial long-term saving which solution of the heirship problem could provide for the Federal Government, favorable loan terms for Indian land purchase loans would be fully justified.

Senator CHURCH. I think you make a very good point there. That certainly is something we will want to reappraise.

Mr. SCHIFTER. Mr. Chairman, may I just give you one example that I noticed the other day in the New York Times, a loan which the Inter-American Development Loan Bank, I think, made to Honduras. It is a 50-year loan, no interest, small payments for the first 20 years, and then larger payments for the next 30. This is the kind of thing Congress is sponsoring, and you know this from the basis of your work in the Foreign Relations Committee.

Senator CHURCH. Yes. I agree wholeheartedly that Indians are deserving of at least equal treatment.

Mr. SCHIFTER. It is the referendum provision which presents the greatest difficulty. In the first instance it unnecessarily complicates tribal governmental procedures. Orderly land planning is clearly a matter of routine governmental concern which should be handled by the duly constituted governing bodies except where the local organic document requires submission of the matter to referendum vote. Many constitutions, incidentally, contain provisions under which a matter of this kind can be petitioned onto the ballot.

A second complication arises out of the requirement that off-reservation members participate in the voting. This is presumably done on the assumption that a tribe should be likened to a business corporation.

I submit that while some resemblance to a business corporation does indeed exist, an Indian tribe is both in legal form and in actual substance far more like a municipal corporation. Legally, the rights of tribal members in tribal property have been defined as "inchoate interests" rather than as vested rights.

In practical terms, the lives of reservation residents are influenced and affected by the economic and political decisions of their tribal governments in a manner similar to that which a municipal or other local government has over the affairs of residents. This situation contrasts rather sharply with the indirect and peripheral impact

which the decisions of the board of directors of a widely held corporation might have.

It would stand to reason, therefore, that Indian communities should have the same right as non-Indian communities to determine the requirements of absentee voting, and of the residence requirements for voting, I should add, in matter other than wholesale liquidation of tribal assets. There is no doubt that the economic interests of off-reservation Indians differ sharply from those of reservation Indians. Putting a veto power over reservation development in the hands of the off-reservation group could condemn the home community to continued economic stagnation. And you notice, Mr. Chairman, that the Nez Perce in Idaho would not be able to improve their lot if they depended on off-reservation—

Senator CHURCH. I think you make a very cogent argument here with respect to the needs to retain in the hands of the duly constituted tribal councils effective control of such matters. That, too, we will want to take a very careful look at.

Mr. SCHIFTER. The next point should be point No. 4.

S. 1392 contains also, in its section 10, a comprehensive program for trust termination. By throwing open for sale vast areas of land, it creates the same problems which have been referred to earlier in this testimony—the problem of dissipation of a valuable community asset, a building block in economic development. Under section 10 a man will receive a trust patent as long as he will exercise “such reasonable degree of prudence as will be apt to prevent him from losing his property or the benefits thereof.”

If he sells his land and buys a luxury car, does he not qualify under this standard?

The experience of the last 10 years, the homeless and landless Indians, the Indian shanty towns, demonstrate both the social and economic cost of premature trust termination policies.

But the situation is not hopeless. The problem before us can be solved, and the administration proposal points the way. Briefly, I would hope that the following approach can be followed:

1. Adoption across the board of the majority rule standard of the administration bill. Contrary to what was said here yesterday, I do not believe that the efficacy of that standard has as yet received a fair test.

Mr. Chairman, the South Dakota bills, as I understand—and Mr. Sonosky will be able to speak on that—have not been implemented by regulations, and once they are I think then you will see whether the 50-percent test is a fair one.

2. Adoption of the purchase preference provisions of section 4 of S. 1392.

3. No limitation on existing lending authority.

4. Adoption of the standard of secretarial discretion of section 5(a) of the administration bill.

5. Adoption of the deferred purchase price principle as contained in section 3 of the administration bill, and I think that is extremely important because again, if you want to have reservation economic planning, you have to consider the development of the entire community.

And, Mr. Chairman, may I add there that there was some talk yesterday of socialization of lands in this connection. There is no thought here of that, it seems to me, because your actual use of land is going to be individual use. As a matter of fact, if I point to the reservation economies in the Dakotas, for example, if a man is required to buy his land, he makes a capital investment, has to pay interest at perhaps 6 to 8 percent, and has to make repayments on capital which are not tax deductible. On the other hand, if he leases the land, he is much better off. He pays a lease fee which is the equivalent of about 3 percent of what his investment in land might be, and it is all tax deductible.

5. Adoption of the deferred purchase price principle as continued in section 3 of the administration bill, on a consent basis.

Mr. Chairman, again I think this can work. You said yesterday it would require a great deal of selling in the first instance to get people to sell at the appraised price. There has been no problem in Pine Ridge at all on that. The tribe has bought a great deal of land at the appraised price. The fact of the matter is, incidentally, that many Indians, if for no other reason, prefer to do it because it is quicker. It takes about 6 months or so to go through the entire bidding procedure.

Senator CHURCH. Yes. Of course, as you know, S. 1392 does permit the tribe to do this.

Mr. SCHIFTER. I think that is quite proper, and I suggest that that standard be adopted.

With aggressive and intelligent administration there can then follow a blocking out of areas inside of which sales would be found detrimental to the Indian community. Outside these areas sales would proceed under the majority rule standard. Inside the area there would be purchases only by tribal members or by the tribe on the basis of perhaps a 20-percent downpayment and a payment of the remainder on a deferred basis.

Mr. Chairman, this is not new. This has been in the law since 1910. If you take a look at the 1910 act it is carried forward by section 3.

Small interests could perhaps be picked up on a full payment. Within the blocked-out area there would be largely tribal land, but there would be individualized land utilization.

Contrary to what was said here yesterday, Indians do sell land to the tribe at the appraised value. The committee's own report reveals the success of the Cheyenne River unallotment program which wiped out 85 percent of the heirship land until Congress, unfortunately, agreed to undo the job. I believe that the foregoing program, implicit in the administration proposal, can succeed if given a chance.

Senator CHURCH. All right, Mr. Shifter. We appreciate your testimony. It will be very helpful. You have some suggestions here that we will want to take into very serious consideration in the committee.

Mr. SCHIFTER. Thank you.

Senator CHURCH. Now the hearing will be adjourned until 2 o'clock this afternoon when I hope we can complete the testimony on these bills.

(Whereupon, at 12:10 p.m., the committee recessed, to reconvene at 2 p.m., this same day.)

AFTERNOON SESSION

Senator CHURCH (presiding). The subcommittee will come to order. Our first witness will be Mr. Hans Walker, who is representing the Three Affiliated Tribes in North Dakota. You may proceed, Mr. Walker. We are glad to welcome you.

STATEMENT OF HANS WALKER, JR., ATTORNEY FOR AND MEMBER OF THREE AFFILIATED TRIBES OF FORT BERTHOLD, N. DAK.

Mr. WALKER. Mr. Chairman and members of the committee, my name is Hans Walker, Jr. I am a member of and attorney for the Three Affiliated Tribes of Fort Berthold, N. Dak.

I wish to make a statement with regard to the Senate bill.

We of the Three Affiliated Tribes appreciate the efforts of the committee to settle the basic heirship problem. We note that there is a provision in the bill for the consolidation of land, but we also note that the provision of the bill precludes any possibility of land consolidation being achieved with any degree of success. The bill provides that it goes into effect 6 months after the date of enactment.

Section 11 provides for the land under probate procedure to immediately go into fee status. While the bill also provides that the tribe may purchase the land the procedure perhaps, would take longer than the date at which time all of the lands would go into fee status, that is, in 1964.

The bill also provides that the tribes may borrow money to make purchases of land, but it has been the experience of the tribes that even though the money will be available, in fact, it has not been available.

The procedure for the tribes to purchase the land, perhaps, is so cumbersome that they will not be able to make the purchases they would like before the 1964 deadline.

Section 4 provides that if no one objects the tribes may purchase at the appraised value. However, when there are so many heirs to a tract of land it is reasonable to assume, there will be one objection. This immediately throws the land up for sale and not into the fee status.

Those are our main objections to the bill. It is the time element, the probability that there will be no money available to make the purchases, and that these tribes have no absolute guarantee of making the purchases.

Thank you.

Senator CHURCH. Thank you very much, Mr. Walker. I have taken note of your objections. We will, certainly, take them into account in our deliberations on the bill. I appreciate your coming here and giving us your testimony.

Senator Burdick may want to ask you some questions, and inasmuch as you both come from the same State we want to be sure to give the Senator that opportunity. I am wondering therefore, if you will remain with us until he returns and then if he would like to call you back for questioning he may do so. Would that be agreeable with you, Mr. Walker?

Mr. WALKER. Yes, sir.

Senator CHURCH. There is a rollcall vote in the Senate. I will have to leave for it. I will be back as quickly as I can. We will now recess.

(A recess was taken.)

Senator BURDICK (presiding). Mr. Walker, will you come forward, please? I want to welcome you to our committee. I might state to the members of the committee that I have known Mr. Walker for a long time. He is a member of the bar of my State, very much interested in Indian affairs, and not only in Indian affairs but in matters affecting all of the citizens of our State.

We appreciate your coming to Washington to give us your views and opinions on this very troublesome question. I believe you recognize the problems, Mr. Walker, in these heirship rights?

Mr. WALKER. That is right.

Senator BURDICK. What in your opinion is the best approach to this problem?

Mr. WALKER. We think that the best approach, the best solution is to make some provision for the absolute opportunity for the tribes to purchase these interests in some manner.

Senator BURDICK. An absolute right, do you mean?

Mr. WALKER. Under this provision in the Senate bill there is a provision that the tribes may buy the land at the appraised value. However, if one person objects the land is put up for public auction and public bid. This does not give the tribes the opportunity to meet the high bid.

Senator BURDICK. In other words, you would like legislation that would reserve as much as possible the right of the tribes to make the purchase?

Mr. WALKER. Correct.

Senator BURDICK. You would not like it to get into non-Indian hands, would you?

Mr. WALKER. Right. Another thing that we object to in this bill is that there are two provisions for the land going into the fee status, 6 months after the bill goes into effect—that all of those lands being probated would become fee lands. That is, if the Secretary found that the heirs were competent. There is not sufficient time there for the tribes to make all of the necessary plans and to put this to a vote in order that they might purchase this land before this occurs.

Senator BURDICK. You are afraid that much of the land would go into unrestricted ownership?

Mr. WALKER. The tribes are attempting to make provisions to purchase the land. Perhaps, these tracts would go into fee status, that is, in the time that they attempted to purchase the lands, that is, to make plans for the purchase.

Senator BURDICK. What other comments do you have to make on the bill before us?

Mr. WALKER. I will repeat some of the objections we have, that it has been the experience of the Three Affiliated Tribes, at least, we have been told a number of times by the Department that there would be money available for loans, and that if we made a request it would be made available to us; however, the experience has been that we have not been able to get sufficient funds for any of our programs, and we feel that if we were to launch into a land purchase program, perhaps, we would not have the money to buy up all of the tracts that we would want.

Senator BURDICK. The core of your arguments seems to be that you would like legislation that would be designed constitutionally to make it possible for these tribes to acquire the ownership of these tracts?

Mr. WALKER. That is right.

Someone in the committee suggested that we could use the State courts. It would be my thought that the State courts would have no jurisdiction over the Indians residing on the reservation on such lands, to determine the heirs, particularly, if they have not adopted Public Law 280 which transfers jurisdiction.

Senator BURDICK. Then you object to section 10 almost in its entirety, do you not?

Mr. WALKER. That is right, yes.

We object to any provision which allows the land to go into fee without the tribe having the opportunity to get funds to purchase the land.

Senator BURDICK. Thank you very much, Mr. Walker. Your testimony has been very helpful. Is there anything else that you would like to add?

Mr. WALKER. If it is possible, the members of the tribal council would like to submit a written statement to the committee.

Senator BURDICK. The record will be open for such a statement.

(As of August 25 the statement referred to was not received.)

Senator CHURCH (presiding). Our next witness is Mrs. Helen Peterson, executive director of the National Congress of American Indians. I understand that Mrs. Peterson desires to testify a little later.

Is Johnson Holy Rock, president of the Oglala Sioux Tribe present?

Mr. SHIFTER. I have testified on behalf of the Oglala Sioux Tribe.

Senator CHURCH. Then we will hear from Mr. Robert Burnette, president of the Rosebud Sioux Tribe.

STATEMENT OF ROBERT BURNETTE, PRESIDENT, ROSEBUD SIOUX TRIBE

Mr. BURNETTE. Mr. Chairman and members of the committee, I am happy to have this opportunity to appear before the committee on behalf of the members of the Rosebud Tribe.

Before we specifically state our objections and our agreements with this bill before us, I would like to say that we recognize that there is a great problem in this heirship land. In fact, we have a specific program at Rosebud called the tribal land enterprise, which is a very workable one, and we think is the answer to the heirship problem if it was applied nationally.

This project, called the tribal lands project, is based on the issuance of certificates of interest similar to stock, in which an amount of money is put in each year. It has been working very wonderfully for the tribe and for the people of the tribe, in that the tribe obtains land from individual heirs, consolidating it and putting it back out to the people for their use during their lifetime.

With that explanation I would like to submit to you testimony on S. 1392.

Section 1 of this bill would be highly controversial and unconstitutional, so far as the landowner is concerned, we believe, because

in doing this one person could request the sale of this land and the other owners of the heirship land would not be protected in any way, unless they would obtain legal counsel, and the problem of obtaining legal counsel in South Dakota is a very difficult one for any Indian to obtain legal counsel in South Dakota because of the conditions that exist there.

Not only that, but there is, also, the problem of financing it among them, because these people are poor and cannot afford to pay an attorney, in the first place, to enter court, so they would be at the mercy of this one individual and would have no protection under the law whatsoever.

Under section 2, the Secretary may, when he deems it in the best interests of the Indian owners, sell and convey such interests. It is pretty difficult to say what the best interests of these heirs are. One of the heirs would petition to sell the land who may, certainly, be competent, but there may be 20 others who are not competent. And if the land were sold they would derive very little good out of the sale of that land.

I would like for the committee to know that over the last 10 years I have been watching land sales on the Rosebud Reservation and it is safe to say that there are not five people who have derived any good out of the sale of their land.

After the sale of their land they have become welfare clients, after the dissipation of their assets.

Section 4 provides for reasonable notice. This would be almost any kind of notice. I submit to the committee here that there are many not only of the Rosebud but other tribes who cannot understand what a reasonable notice may be, or even if they would be served personally would not understand what it is as a whole, unless they go to someone for an explanation.

We believe there is a great deal of good in section 5, and this is one thing that we would like to tell the committee, that this problem of heirship is not a singular problem, it is a multiple problem, because when you attack the heirship problem you are, also, attacking the basic living of these people, and if this land were sold, conveyed out of the hands of these people, there would be created other problems.

To give an example, Fort Totten, the people are living on welfare, almost \$500,000 for welfare, because they do not have money. If this were done, I would say that it would cost the Federal Government somewhere near \$10 million to carry on the welfare program that would be created. And this would multiply over the next 10 years twice.

We are in agreement with the provision of the bill that provides for loans to the tribes. This, we think, is part of the answer to the heirship problem. If the tribes can get this into its own hands, and then pass it on to the individual members for their use during their lifetime, there would be no heirship problem in the future.

It, also, provides protection for the mineral rights if the tribes have the ownership of the land.

Section 5(f) provides that the tribes would bear the cost of managing the program. Presently, for the committee's information, we believe that the tribes are managing their lands on the Rosebud better than anybody in the Bureau of Indian Affairs can possibly manage

it. We raise more from our lands than the Bureau raises from individual allotments.

I would like to say at this time, that in section 5(e), it calls for a referendum vote. I would like to submit to the committee that this is an impossibility. The Rosebud members are scattered the world over. We have people in Germany, in Japan, and all over the world—all over the United States—and this would, probably, cause these tribes somewhere in the neighborhood of \$20,000 to hold a referendum.

We, certainly, do not have that kind of money to pursue a referendum.

It also calls for the approval of the plan by the Secretary of the Interior. And in the past 10 years the tribes of the United States have gone through the experience of submitting plans to the Secretary of the Interior and having him turn them down time after time, when there were programs that were developed by the tribes and would have been carried out by the tribes.

I would like to submit to the committee at this time, too, that in programming for a tribe it is vitally necessary that the tribe itself develop the program, and not have a program forced upon them from some place above or otherwise, because you will not get Indian participation in a program fully unless it is developed by the people themselves, and it is something they want.

It has been the downfall of all of the administrations of the past in that they have not done this. They have not had Indian participation. We think that is the cause for what Senator Allott said yesterday as to the unsuccessful attempts to do things. When we get people involved in programs that are ours, developed by ourselves the Indian people, then they are successful and the people go along with them.

We object highly to the end of the trust period which is stated in section 10(e) as January 1, 1964. We do not think it is possible for the tribes to submit a program to the Secretary of the Interior and have a workable program within a 3-year period.

We would like to submit at this time, too, that we have not created this problem, the Indian people ourselves. We did not legislate the programs we have been under. We submit to you that it will take time to work out of the heirship problem and all of the rest of the problems that have been created under the programs of the past.

The problem of working with the people and, especially, Indian people who, for the most part do not understand English, are very difficult, one that has to be worked with very diligently and you have to be very careful, because at any minute the fire can spread and the program be destroyed just by propaganda that is put out by some individual member of the tribe or conflicting organizations.

I notice in section 11 of this act that would become effective in 6 months, and this we do not think is a very good idea, because it gives only 6 months to begin to prepare for this thing, and we doubt very much if the administration itself could work out all of the necessary policy decisions and regulations needed to carry out the functions of this act if it were passed.

Those are the objections we have.

I would like to submit to the committee that we are in agreement in principle, that is, with H.R. 8077 which has been introduced in the House. We think that the Department of the Interior is on the right track, although the bill may be unconstitutional. We think that this program if properly worked out would be the kind of program that the United States should have put into force years ago.

We submit to the committee that the solving of the Indian problem will never take place until Congress recognizes, as well as the administration, that a program must be developed overall in order to attack the whole Indian problem, because whenever you talk about education, whenever you talk about heirship land, whenever you talk about welfare, whatever you talk about, it goes to a segment of the Indian problem. We do not believe it is an Indian problem. We believe there is Indian need that needs to be fulfilled, and we have always looked upon the United States as a group of people who have fulfilled the needs of those who are in need, and we think it is time that the needs be met of the Indian people, so that they will become productive citizens and not ones dependent upon the United States.

I should, also, like to submit to the committee that we think there are enough statutes on the books to properly carry out all of the necessary programs that are needed by the Indian people, if they are implemented, and if the Congress will issue a policy that will allow the administration to proceed in carrying out the necessary programs to fulfill the needs of the Indian tribes and the people themselves.

Our program is under the act of 1934, and I think that there is enough legislation there to carry this out, if it was properly implemented.

I have one objection to H.R. 8077 that I would like to submit to the committee, the portion that will take the heirship problem to the State courts. We object, of course, to the various bills because of this. The State courts in South Dakota, and then the Indian does not stand a chance, in the first place, if he enters the courts there. To prove this, one-third of the population in the penitentiary in South Dakota consists of Indian boys, young men; one-third of the population in the training centers, also, consists of Indians.

Many of these things are uncalled for. We have had case after case in the State courts where our constitutional rights, that is, of the Indian people, have been fully denied. We have submitted this to the U.S. attorney in South Dakota. We have submitted this to the Governor, to the attorney general of the State, to the Civil Rights Commission. We have, also, submitted this to the Senate Constitutional Rights Committee. Nothing yet has been done about it, although I understand that there are steps being taken by the Senate subcommittee to hold hearings on this matter.

So the Indian people are very much afraid of what would happen to them if they were placed under the jurisdiction of the State at this time. We would have no fear of the State court if we were to be treated equally, like everyone else, but I think, probably, this is in the future.

It must be worked out. We are working at it, although we are not gaining too much ground at the present time. I think there has been some improvement in the last few years.

I would, also, like to submit to the committee, I believe that so far as the Indians are concerned much of the Indian land in the United States is not used by Indians, it is not being fully utilized or developed by Indians, but is being developed for the use of non-Indians. We run into problems like this.

I should like to point out to the committee, too, that in the testimony yesterday you were trying to get at a problem, trying to get an answer, but did not get one. You were trying to find out what happens if one Indian wants to purchase land against the tribe wanting to purchase.

We have run into this problem time after time at Rosebud. We found in each case, where an Indian was desirous of purchasing that tract of land, over the interests of the tribe, that there was always a non-Indian behind the Indians who were trying to purchase.

This is true, generally, of all of the land sales on the Rosebud Reservation. Wherever you see a request for a land sale you will find someone in the background who has made an offer.

To give you an example, one of our councilmen, Mr. Paul Carver, who is supposedly a very intelligent man, put in an application for a patent fee. He received it. He told me before he had done this that he was offered \$8,000 for his patent fee. He received the patent fee, went to Valentine, turned it over to the man who was going to pay him the \$8,000. He signed the patent fee over, the man locked it up in the safe and said that there was \$2,300 in liens against this patent, so I will have to hold it. He came to me. I went to Valentine with him. In the end he realized less than \$3,000 from that patent fee.

This happens time after time after time to the Indian people. In fact, I know of one case where the mineral rights were purchased before the patent was even assigned, turned to the individual who purchased that patent fee. A mineral deed was signed and taken down to the State recorder and registered there before the patent fee was registered.

So we run into these problems as Indian leaders, as you run into problems as leaders of the country.

We should like to point out, too, as Senator Allott said yesterday that Indians were requesting special privileges. We do not look at this from this angle at all. We believe that we were born with this right as Indian people. We gave up much of our land for the United States to be as great as it is. We have paid for our reservations that were taken from us, as they said conquered. But we do not think that the U.S. people are that kind of people. They have always been very gracious and generous to the enemy after they have fought him. So the money that is appropriated for the Bureau of Indian Affairs we do not look upon as a great deal of money when you look at the rest of the cost of running the departments, compared to the Bureau of Indian Affairs, it is very small. In fact, we believe that the appropriation should be much larger so that these problems could be attacked today and not tomorrow, when the proposition will be double and the cost will be that much more.

We believe it will cost less in the end to the Government. We believe if this is attacked today overall the Indian people will work themselves out of the position they are in, and they themselves will wish to be released from the Government some day when they are

ready, but today we have many people who are nowhere near capable of defending themselves and must defend themselves, they must depend upon the council to protect their rights.

With that, Mr. Chairman, I thank you for the privilege of appearing here today.

Senator CHURCH. Thank you. Do you have any questions, Senator Burdick?

Senator BURDICK. I want to thank the witness for a very fine statement. Is it a fair statement to say in summary of your statement that you believe that there is sufficient legislation on the books now?

Mr. BURNETTE. Yes; the reason I say that is I do not believe the people will allow the violation of anyone's property rights. If I own one-tenth of 1 acre, I do not think that they could take it away from me without my consent and without paying for it. At least, that is what I believe.

Senator BURDICK. Were you in the committee room this morning when the witness from the Department of Justice testified? That seemed to be their opinion, too.

Mr. BURNETTE. Right. There is, also, a case on leasing. Even in the case of leasing the Supreme Court has ruled that the United States or anyone else cannot arbitrarily lease any land without the consent of the owner.

Senator BURDICK. Even in trust?

Mr. BURNETTE. Yes.

Senator BURDICK. We hear so much about the problem, how great it is. I believe you testified that the laws of 1934 are adequate with particular reference to this problem. Why has this problem persisted if you have legislation? That is, if you have sufficient legislation?

Mr. BURNETTE. It is my opinion that this problem has persisted because no one has been working on it, or on an overall program. We have been working on it. Rosebud has been working on it and doing a very good job of it, we believe. We are getting rid of a lot of these problems. We believe we are saving the U.S. Government a lot of money by getting rid of them.

Senator BURDICK. That is all I have, Mr. Chairman. Thank you very much.

Senator CHURCH. Your tribe has been acquiring this land, has it not in part, with money that has been loaned to it by the Federal Government?

Mr. BURNETTE. Yes, sir; we have borrowed one-half of a million dollars from the Bureau of Indian Affairs.

Senator CHURCH. I think your tribe should be commended for the leadership it has shown in your effort to get this problem resolved. I am sorry that your efforts are not typical of the situation everywhere, where other tribes are involved and other problems are involved.

Thank you for your testimony. I appreciate it. I though it was very well presented.

Mr. BURNETTE. Thank you.

Senator CHURCH. We will next hear from Mrs. Helen L. Peterson, executive director of the National Congress of American Indians.

Mrs. Peterson, it is always a pleasure to welcome you to this committee.

**STATEMENT OF MRS. HELEN L. PETERSON, EXECUTIVE DIRECTOR,
NATIONAL CONGRESS OF AMERICAN INDIANS**

Mrs. PETERSON. Thank you very much, Mr. Chairman.

The National Congress of American Indians wishes the record to show that it appreciates the time and effort spent by this committee and its staff on the study of problems of fractionated interests in inherited Indian lands. The published report by this committee is a major undertaking and surely reflects the serious concern of the committee for finding solutions to the problems facing both the Indians and the Federal Government in the matter of heirship lands.

The NCAI position is spelled out in resolutions adopted over a period of years, and in the language of a number of bills introduced in past Congresses, namely (84th Cong.) S. 1784 (Murray, Goldwater, Dworshak, Welker, Mansfield, Young, Morse, Neuberger, and Barrett), H.R. 4226 (Metcalf), H.R. 4512 (Berry); (85th Cong.) H.R. 2787 (Berry); (86th Cong.) S. 2236 (Langer), H.R. 5424 (Metcalf). NCAI has passed several resolutions over the years dealing with inherited interests in Indian lands. The most comprehensive of these was enacted in Omaha, Nebr., at the annual convention in 1954 and stands, as of this date, as the official position of the organization. The resolution is attached hereto and we respectfully request that it be made part of the record.

Senator CHURCH. Without objection, it will be made a part of the record at this point.

(The resolution referred to follows:)

RESOLUTION No. 5

**ELEVENTH ANNUAL CONVENTION, NATIONAL CONGRESS OF AMERICAN INDIANS,
OMAHA, NEBR., NOVEMBER 18-21, 1954**

Whereas the administration of Indian property is more difficult and costly, from the viewpoint both of the Federal Government and the Indian tribes, because of complications arising from inheritance by two or more heirs of allotments granted to original allottees; and

Whereas fractionated interests in such lands frequently do not constitute economic units for the heirs or the tribe concerned, with the result that such interests usually are leased more frequently to non-Indian lessees rather than being worked by Indian owners; and in some cases the tribal lands themselves are not held in economically feasible units for grazing and other purposes, but could be made so by acquisition of or exchange for allotted lands, including those in heirship status; and

Whereas the self-help of the tribes can be called upon in the solution of this problem of the tribes are authorized to negotiate with and purchase from the heirs the title to particular allotted lands, at prices found mutually satisfactory, and with authority to lease, sell, or assign the lands; and

Whereas in the case of some Indian tribes there may not be sufficient tribal moneys to permit purchase of allotments in heirship status, but the lands themselves would constitute sound security for the advance by the United States of the purchase price (or so much of the purchase price as might be necessary in the particular case); and

Whereas some practical resolution of this difficulty must be effected before the United States can intelligently and fairly absolve itself of all trust responsibilities growing out of its treaty and constitutional obligations to Indian tribes; Be it

Resolved, That the National Congress of American Indians, recognizing the need for Federal legislation to solve this problem, urges Congress to enact legislation to include the following provisions:

(1) Grant Indian tribes prior purchase rights to acquire interests in heirship allotments at fair prices or to meet the high bid in sales at auction, except that

this prior right shall not be superior to the right of heirs to acquire such interests;

(2) Grant tribes prior purchase rights to acquire from allottees allotments which may, in the foreseeable future, become subject to heirship status;

(3) Authorize expenditure of tribal funds, including trust funds in the U.S. Treasury, and authorize appropriation of sufficient funds, to be made available at the discretion of the Secretary or his authorized representative, to the various tribes, on a revolving-fund basis, in order to carry out the above purposes;

(4) In order to effect consolidations of land for the mutual benefit of tribes and individual members thereof and adjoining landowners, authorize the sale by tribes to individual members of tribes, tribal land which may not be needed for effective economic utilization by the tribe, such land to be held in trust by the United States for such individual tribal members for the period of time during which any repayment agreement shall run following its sale to such members by the tribe;

(5) Authorize exchange of tribal trust lands or individually owned lands (including lands in heirship status) for lands held by individual members of the same or other tribes, including lands in heirship status.

Mrs. PETERSON. NCAI is in accord with two objectives of the present bill, S. 1392, 87th Congress. Those two respects are, first, the preferential rights of tribes to purchase fractionated interests, and secondly the loan of Federal funds to enable them to buy the lands. But in one serious respect—here we would like to have the written statement show a comma and then, among others comma—the bill meets the opposition of NCAI through providing for termination of individual trusts on or before January 1, 1964—which is heedless of the devastating results on Indian ownership which would result from throwing the lands open to taxation by what frequently are hostile local governments who will not permit Indians to share in the proceeds of what taxes buy, and bring about destruction of the Indian-owned land base through liens, mortgage, and foreclosure, and the multitude of ways in which a person not skilled in the non-Indian way of doing things may be parted from his title to the soil.

Our attention has been called to H.R. 8077 (87th Cong.) pending in the House, which we are told is an administration-sponsored solution to this long-standing problem of Indians. As to that bill, while we feel it generally presents constructive solutions to the problem, we raise one note of caution. We are advised by counsel that there may be some legal difficulties with section 3 of that bill, which provides for a taking of the title of the heirs of allottees without providing for the payment of just compensation, required by the fifth amendment to the Constitution, for the seizure of their property. Our attorneys point out that the inherited interests of heirs is individual property; that the courts have long held that Indians are entitled to the constitutional protection of the fifth amendment in connection with their allotments; and that "just compensation" means payment made at the time of taking with a right of access to a tribunal having jurisdiction to establish how much is due.

We would like to add to that which is included in this statement the fact that the National Congress of American Indians is highly appreciative of the Interior Department's Task Force Report and in accordance with the overall objective and intent of the Department's and task force's concern to find solutions that will help Indian tribes realistically, either individually or as tribes, to acquire these lands.

The bills introduced in former Congresses which are listed at the outset of this statement would permit anything which could be ac-

complished under either S. 1392 or H.R. 8077, if it makes sense to the particular tribe in the light of its circumstances. The bill that we have supported the last three Congresses, making the particular plan to fit the particular needs.

Our bill permits tailormaking the particular plan to fit the particular needs of each reservation and tribe, and does not follow the policy of forcing a general bill on tribes without regard to their particular needs and the differences which exist between them.

Accordingly, NCAI respectfully suggests that the language of S. 1794 of the 84th Congress be substituted for that in S. 1392, now before the committee, and that the committee report the bill favorably.

We do, also, ask the committee seriously to review the loan provisions, the referendum provisions in S. 1392 and ask that those be amended in line with the testimony by the Indians in this hearing.

I shall not read the resolution, although we certainly hope that every member of the subcommittee will read the Resolution 5 from the Omaha convention because this sets forth rather clearly the wishes of the Indian people as to what they would like to see included in heirship legislation.

In conclusion, I would like to say, Mr. Chairman, that the Fort Sill Apache Tribe of Oklahoma has asked you to receive a statement from them which will come in a few days and that it should be included as part of the record.

In addition, the Crow and Cheyenne Tribes of Montana said that they were each sending telegrams, and asked that you include those telegrams in the record.

Senator CHURCH. Yes, we have received a telegram from the Crow Tribal Council, from John B. Cummins, and we have also received a telegram from John Wooden Legs, president of the Northern Cheyenne Council. Both of these telegrams will be incorporated in the record, and permission will be granted for the inclusion of the statement from the Fort Sill Apache Tribe.

(The telegrams follow:)

HARDIN, MONT., August 8, 1961.

HON. FRANK CHURCH,
U.S. Senate Office Building, Chairman, Committee on Indian Affairs,
Washington, D.C.:

Northern Cheyenne Tribe opposes the enactment of S. 1392. Statement of objection follows which we would like inserted in the record.

JOHN WOODEN LEGS,
President, Northern Cheyenne Council.

HARDIN, MONT., August 8, 1961.

HON. FRANK CHURCH,
U.S. Senate Office Building, Chairman, Committee on Indian Affairs,
Washington, D.C.:

Crow Tribe objects to the provisions of S. 1392. This bill would conflict with the provisions of the Crow Allotment Act of 1920 and could not be workable on the Crow Indian Reservation.

JOHN B. CUMMINS,
Chairman, Crow Tribal Council.

(As of August 25, 1961, the statement from the Fort Sill Apache Tribe was not received.)

Mrs. PETERSON. Also, the Omaha Tribe has asked me to say to you that it opposes S. 1392. It, also, is submitting a statement for the

record and would like the committee to accept their statement for the record.

Senator CHURCH. Very well, it will be accepted for the record. (As of August 25, 1961, the statement from the Omaha Tribe was not received.)

Senator CHURCH. We again want to thank you, Mrs. Peterson, for coming here. Do you have any questions, Senator Burdick?

Senator BURDICK. I want to compliment you for your fine statement. I believe your statement is a very good statement. We always depend upon you to come up with something like this.

As I understand it, in paragraph 3 of your statement, you say that you are in favor, first, of preferential rights of the tribes; and secondly, the loan of Federal funds to enable them to buy the land.

Are you in favor of the highest bidder approach or the fair market value approach or the appraised value approach?

Mrs. PETERSON. The resolution which is attached to my statement decided on the subject of the highest bidder, but I would guess, Senator Burdick, that allottees, owners of inherited interest, would have objection if there were not a provision for a high bidding.

I think, on the one hand, that many individual Indians would like to negotiate a sale to the tribe at the appraised price, but I think that there would be allottees who would insist upon getting the highest price that they thought competitive bidding might bring them.

Senator BURDICK. Do I understand that would be the position you would favor?

Mrs. PETERSON. I prefer to state what the language of the resolution and the bill, S. 1784 of the 84th Congress, states, because this permits each tribe, provided the Secretary agrees, to work out its own plan.

Senator BURDICK. We have two bills before us—one is predicated on the appraised value theory and one is predicated on the highest bidder theory.

Mrs. PETERSON. My statement says that. We are advised by the legal counsel that the Department's bill would raise serious questions.

Senator BURDICK. Legal questions?

Mrs. PETERSON. That is right.

Senator BURDICK. That is all, thank you.

Mrs. PETERSON. I hope you will have a third bill after my statement.

Senator CHURCH. Thank you, Mrs. Peterson.

Mrs. PETERSON. Thank you.

Senator CHURCH. I am sure that as a result of these hearings the committee will make very substantial changes in the bills that have been presented. We have been trying our best to fashion a bill that would be an effective instrument in coming to grips with this problem and will be fair to both the allottees and to the Indian tribes. That will be our objective.

The testimony has been very helpful to us in pointing up some of the problems that these different proposals entail.

Next is Mr. E. Thomas Colosimo, representing ARROW, Inc. I understand you have a statement you would like to submit to the committee.

STATEMENT OF E. THOMAS COLOSIMO, EXECUTIVE DIRECTOR,
ARROW, INC.

Mr. COLOSIMO. Mr. Chairman and members of the committee, my name is E. Thomas Colosimo. I should like to address myself to S. 1392 and do so as executive director of ARROW, Inc.—a nonprofit organization working in the field of American Indian welfare and self-development.

ARROW has—as have most organizations dedicated to alleviating the complex problems of Indian living—long been aware of the intricate and crippling land-utilization and economic development difficulties created for the Indians and for the administrative government agencies by the fractionization of Indian lands through the heirship process. Indeed, the problem is becoming so acute that administrative costs have become disproportionately high, the lands are becoming less and less unstable, and the income from those lands is becoming virtually nonexistent.

Consequently, ARROW wishes to extend its most laudatory praise to the authors of S. 1392 and the members of both the Senate and House Indian subcommittees for their pioneering efforts to properly identify the heirship problem and to seek an equitable solution.

Before the formalization of S. 1392, members of these two subcommittees, with the cooperation of Congressional Library experts, engaged in very thorough and intensive research resulting in a comprehensive land-heirship analysis which is noteworthy for its clarity, its completeness, and for its authority (since it is based on the expressed opinions of those most deeply affected by the heirship problem—the Indians themselves).

ARROW feels that any bill based on such an ambitious, complete and authoritative report—as S. 1392 is—deserves full consideration.

However, within the past few days, a substitute proposal has been brought to my attention by the administration's task force on Indian affairs. This proposal—which incorporates many of the strengths of S. 1392—offers additions and counter-proposals.

While ARROW is pleased to see congressional initiative and bold action in dealing with a long-neglected and increasingly difficult problem; and while ARROW would decry any action tending to delay passage of sorely-needed corrective legislation, we would strongly recommend that S. 1392 be used only as a working foundation toward the equitable solution to the heirship problem, and that the recommendations of the task force be considered as building blocks upon that foundation, so that legislation most nearly beneficial to the Indians and others concerned may be expeditiously formulated. Further delay will keep the economic door closed to higher standards of health, education, and welfare for many Indians—all prime objectives of ARROW.

Mr. Chairman, this is to request, that in view of the fact that I have only the other day received a copy of the administration's substitute proposal that ARROW be given permission to file a full statement on S. 1392 as soon as it has had time to compare it with the administration substitute bill and itself has submitted a statement to the board of directors for approval.

Senator CHURCH. That will be fine. However, we should not hold the hearings up in order that we have that, because we want to have

the hearings printed and move on with the legislation. Do you think that you could get your statement in within the next few days. Others have asked for additional time.

Mr. COLOSIMO. Yes.

(As of August 25, 1961, the statement referred to was not received.)

Senator CHURCH. Thank you very much. Senator Burdick, do you have any questions?

Senator BURDICK. I presume that your statement will treat the two bills in detail. I noticed that your statement is more or less a general summary. You intend to treat them in detail as to what you like and do not like in the two bills?

Mr. COLOSIMO. That is correct.

Senator CHURCH. Our next witness is Mr. Melvin Robertson. We welcome you, Mr. Robertson.

STATEMENT OF MELVIN ROBERTSON, DELEGATE, SISSETON SIOUX TRIBE

Mr. ROBERTSON. Senator Church and members of the committee. I am the official delegate of the Sisseton Tribe. I am not a member of the tribal council. The tribal council asked me to represent them here at this hearing.

All of the legal aspects of the bill have been discussed and gone over and gone into deeper than my limited knowledge can offer. So I do not think it would serve anything for me to go into that.

There are a couple of recommendations we would like to make.

The first one is in section 5(e). Here the Secretary shall approve a tribal plan and it states:

The Secretary shall not approve a tribal plan unless it is agreed to by a majority of adult tribal members, both on and off the reservation.

The Rosebud representative touched on that. Somehow it should be worded to fit into the tribal constitution. That does not recognize a general council unless a certain majority of the adult members of the tribe are present. This is including the members on and off the reservation. I cannot help but feel that many of these questionnaires that were sent out and returned to you where such a large percentage of them were in favor of selling their land outright came from those off the reservation. There are many of us that are living on the reservation today—and probably will be able to carry on as any non-Indian, but we are here testifying for Indians who are in the backwoods. They do not know how to read and write. For that reason, I think that in a portion of bill here where you leave certain powers and authorities at the discretion of the Secretary, I think the tribal council should be included in that.

My reason for it is this: Yesterday it was brought out here where the Secretary had authority in giving out deeds it took into account the question of competency, the so-called competency in 1910.

To give you an example of what happened to one family, there were six boys, six young men in that family. Their father got the fee patent. They went back to the bank and borrowed money. Four of those boys never finished the second grade; two of them never finished the sixth grade. I know this to be a fact. These six men were my

uncles. And not one of them has an acre of land left in their own personal allotment.

The Secretary of the Interior delegated this authority to the superintendent. The superintendent used his judgment, and I think there was a board there to help the superintendent. I think my relatives could have retained their rights. I think the tribe should have given other considerations as to who is competent and who isn't, give authority to recommend as to who is competent and who isn't.

I don't believe there is anybody who knows their own people any better than members of the tribe.

Now there is one other recommendation we would like to make over here on section 11. This act shall become effective 6 months after date of enactment. We feel that we should have at least a year.

Our reason for that is, as you probably know, Sisseton is probably one of the poorest reservations in the United States, and our tribal council who work only 1 day out of each month—we do not have a full-time tribal employee; so we feel it would take us a little bit longer than 6 months to draw up a land program although we have already begun to draw up the land program, started it some time ago.

We feel when our program is submitted and approved that it will take us less time to get out of the predicament that we are in here now than it took us to get into it, and we feel that one of the solutions, just one of the solutions to the problem is education, and we are doing that fast. We now have some 2,800 Indians on the reservation, and we have approximately 4,300 on the roll. All the rest have gone, left the reservation, gone to work, and they will never return. And, because they have left it, they have acquired a higher standard of education, and we feel that through our tribal land program we can help those that would like to further their education and do not further it because of lack of clothing, tuition, and so on, spending money and so forth, and we feel that with a good, sound tribal land program we could assist these younger people, and in time we will determine ourselves, and that is the only solution to termination, self-determination, and not have it forced upon us.

I thank you very much, Senator.

Senator CHURCH. Thank you very much.

Senator Burdick, any questions?

Senator BURDICK. No questions.

Senator CHURCH. Mr. Sonosky.

STATEMENT OF MARVIN J. SONOSKY, ATTORNEY, WASHINGTON, D.C., REPRESENTING THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION IN WYOMING, THE STANDING ROCK SIOUX TRIBE OF NORTH DAKOTA AND SOUTH DAKOTA, THE FORT PECK TRIBES OF MONTANA, AND OTHER TRIBES

Mr. SONOSKY. Mr. Chairman, members of the committee, my name is Marvin J. Sonosky, 1028 Connecticut Avenue NW. I am general counsel for a number of Indian tribes.

Senator CHURCH. Do you have a prepared statement, Mr. Sonosky?

Mr. SONOSKY. I will be frank with the committee, and say I had prepared testimony until I heard the testimony yesterday. I have revised my statement and do not have it yet reproduced. But I would

like permission to furnish it to the committee within the next 2 or 3 days.

Senator CHURCH. Very well. We will hold the record open for a week.

Mr. SONOSKY. Thank you, Senator.

(The statement referred to is printed in the appendix to this hearing record.)

Mr. SONOSKY. I am general counsel for a number of Indian tribes in North Dakota and South Dakota and in Montana and Wyoming. I represent the Standing Rock Sioux Tribe of North Dakota which Senator Burdick is well familiar with, and I appreciate this opportunity to present my views on behalf of the tribes I represent.

I say my views because it was my understanding, which was confirmed by the statement made yesterday by the chairman, that S. 1392 was intended as a vehicle for gathering in the positions of all concerned in order to develop a piece of final legislation, and I have so advised the tribes I represent, and have suggested to them that their final determination of support or opposition should be withheld until we have an opportunity to examine the product of these hearings. But at this time I would like to say that we favor the principle of remedial legislation, but we are not prepared to go all out in favor of either S. 1392 or H.R. 8077 which is the House version of the proposed legislation from the administration.

I would like to outline the broad views of the tribes. Many compliments and accolades have been paid to the outstanding staff work of this committee and the factual data that they have collected leave no room for argument, but there is need for remedial legislation to clean up, in part at least, what the chairman yesterday referred to as a mess, and it is a mess which will continue to become aggravated as the years go by.

But the tribes I represent are somewhat worried that the committee may be impatient over the horrible conditions it found, so that it might lead the committee to concentrate on the cure for the conditions and recommend legislation which might solve the problem at the expense of the people the committee really intends to aid. In other words, we are concerned that your medicine will be too strong and that it will result in damage that we cannot now foresee and which I am sure is unintended.

This heirship problem that we have is the creature of Congress. Congress created it in the first place, and I see now Congress undertakes to cure it. Congress created it when it converted tribal lands into individual allotments with restraints against alienation. We know as the lands passed by inheritance and the number of owners increased, their individual interest in the same piece of land got smaller and smaller, and the process is a continuing one, and the results have been unsatisfactory to everybody. They are unsatisfactory to the United States because of the great costs that are involved.

This committee has had evidence from the General Accounting Office which establishes that. They are unsatisfactory to the individual Indians because the small fractional interest he has doesn't mean a thing to him. The only individual Indian who may be satisfied is the one who has, as your statistics show, a substantial or fairly decent amount of income coming from his fraction, or if he happens to be the Indian in possession.

I was really delighted yesterday to hear expressions from the Chair indicating recognition of the trust responsibility, not only to the individual Indian but also to the tribes, the whole body politic. The tribes are concerned over several things. They are concerned that this legislation should not destroy the land base in the open reservations, and by "open" I mean reservations where there have been large allotments made, which is the condition in North Dakota and South Dakota and Montana. In those reservations the individual trust land, fractionated or not fractionated, forms a part of the overall land base. Such land is incorporated into substantial economic grazing units. Most of this land is grazing in those States.

If you pull out of those units key tracts, tracts which control water, tracts which control access, you may be destroying the use and value of hundred of acres of other trust lands that belong to the tribes and other individual Indians.

The tribes want to be certain that you have protective features in the legislation which will prevent this from happening. The tribes are also concerned for those Indian families who now are living on fractionated heirship lands which under the proposed legislation could be involuntarily sold. And then what will happen to them?

The tribes are concerned that Indian communities which are now living on land which is in fractionated heirship will be destroyed if that fractionated land is sold. And what will happen to them?

The tribes are concerned that their efforts to block out consolidated Indian holdings should not be defeated by law on the strength of commitments made by the United States through loans made to the tribes. Large sums of money have been used by the tribes in developing solid blocks of Indian land so that they could be put to use.

You heard the testimony of Mr. Robert Burnette, president of the Rosebud Sioux Tribe, who is recognized as one of the most dynamic and aggressive young American Indian leaders. When he first came to the Rosebud Sioux Tribe their annual income was in the area of \$40,000 a year, and he was not kidding this committee when he said the tribe could manage that land better than the Bureau, because in the 6 years he has been there that income has been raised to \$220,000, and under their 5-year plan we look for \$1 million a year income from that reservation, proving it can be done. And he could have done a lot more if in the past he had had some of the warm, sympathetic, understanding leadership that we expect will be given under the commissionership of Mr. Philleo Nash and under the leadership of Assistant Secretary Carver whom we have found to be very wonderful and very helpful to us.

The point is that in working out these programs, in spending tribal money, in spending Federal money loaned to the tribes, they do not want the way left open midway in these programs to destroy them by opening up the way to have these lands moved involuntarily out of trust ownership. The tribes are not looking forward to the prospect of competing with non-Indian ranchers who are avidly anxious for a chance to bust the tribal holdings, and this S. 1392 provides an avenue for that.

We want legislative protection against that.

The tribes are also concerned about their own people. They want consideration to be given to the proposition of just what are these

individual Indian owners going to get out of this fractionated heirship land. We want to know what is going to be done about those tracts of land which now have against them large substantial claims.

I am talking about old-age assistance claims, which has not been mentioned to this committee. These claims are filed against this land unlawfully, in my opinion, and they are treated as if they were mortgages or liens against the land. In other words, what I am saying is that if an Indian receives old-age assistance, upon his death the State of North Dakota or the State of South Dakota or Montana files a claim against the estate for the amount of old-age assistance given to him in his lifetime.

The Secretary of the Interior, without any legislative authority, in my opinion, presently treats that claim as if it were a first lien against the land in perpetuity—no statute of limitations, nothing.

If the Indian leases his land, all of the income from the lease is used to pay that claim. If the Indian sells his land, the total amount of sale is first applied against the claim.

I say to you——

Senator CHURCH. Let me just get this straight.

I take it you are referring to a case where the land is sold out of Indian ownership.

Mr. SONOSKY. Yes; whether it is sold out of Indian ownership or not, if it is sold, whether it is sold to another Indian or to the tribe or to a non-Indian, it makes no difference; the purchase price would be paid to the heirs subject to the lien of the claim for old-age assistance against their ancestor, and that lien would be taken out of the purchase price.

Senator CHURCH. That is presently occurring in the States?

Mr. SONOSKY. It is occurring now.

Senator CHURCH. Has this ever been tested?

Mr. SONOSKY. I am testing it now. I have a suit pending against the Secretary in the district court in the District of Columbia, but it is the first time it has been tested.

Senator CHURCH. So we don't have any precedents here established as yet?

Mr. SONOSKY. We don't have a decision by a court.

So that I can bring this home to you; let us say that an Indian owns a piece of trust land and dies leaving six heirs. During his lifetime that Indian was on old-age assistance. A claim for \$4,000 or \$3,000, which is about the size of these claims, is filed against that land.

Now the regulations say this Indian can lease this land, these heirs can lease the land. But if they lease the land, all the money goes to pay the claim. That land is grazing land. It brings in maybe \$80 a year, \$100 a year. So, over a period of 40 years it will take that much time to pay off a \$4,000 claim.

Is there any incentive on the part of the Indians to lease that land? Shall we sell the land?

If we sell it the land will bring in \$3,000. Who will get the \$3,000? The State of North Dakota, the State of South Dakota, to pay the old-age assistance claim.

Is there any reason for the Indian wanting to sell that land? Aren't those heirs better off living on it, using it, having it?

I say that this is a problem which has got to be considered in connection with this legislation. And, although I looked for it all through the reports made in the research done by this committee and the House committee and the General Accounting Office, I hear mention of it but there is no report made, and it would be very interesting to find out how many of these tracts of land are in that status, and there is a substantial number.

With all due respect to the committee, on all these things on which I have expressed the tribes' concern, I see nothing in S. 1392 to take care of it.

Senator CHURCH. Mr. Sonosky, if you will excuse me a moment, I think it might be well for the Indian Bureau to file with the committee and make part of this record a statement of the view taken by the Indian Bureau with respect to the questions that you have raised.¹

You are quite right. There is nothing in either of the proposals before the committee now that would deal directly with this problem, and the problem is very real.

It might be that we will want to look into it more thoroughly to see what kind of legislative remedy, if any, is feasible. But we ought to have something in the record from the Indian Bureau on this question, I think.

Mr. SONOSKY. And if the chairman so desires, I will be glad to submit to the committee my brief before the Secretary in which I argue this proposition. It contains my legal grounds.

Senator CHURCH. Good. I understand there is a Solicitor's opinion on the question, too, is there not?

Mr. SONOSKY. There is a Solicitor's opinion, and I deal with that, too.

Senator CHURCH. I think we should have how you deal also with the Solicitor's opinion. It may be that we may want to take this question up as a separate matter apart from this, but I think in any case it is a question of sufficient seriousness for this committee to look into.

Mr. SONOSKY. I mention it only because under S. 1392 or H.R. 8077 this land would be involuntarily moved out and you would have the Indian divested of his land, no land, no money, nothing. All he has is a receipt for a doubtful debt.

We agree if we are going to solve this fractionated heirship problem we have got to divest the heirs of their fractional interests. But what we are not agreed on exactly are the remedies, and I don't propose here today to criticize your remedies without offering some alternatives.

S. 1392 offers two remedies. One, a design to cure the fractionated existing situation—that is in section 1. This oversimplifies it. And the other one I regard as a prophylactic to prevent future recurrence of the situation, and that is section 10(b).

The curative feature of S. 1392 in section 1 calls for involuntary sale by administrative partition at the request of any owner of an interest in the land, and that partition must be held unless the Secretary finds that the sale would not be in the best interests of the Indian owners.

Senator Allott this morning suggested what is the best interest of the Indian owners. What does it mean.

¹ See letter dated Aug. 16, 1961, from the Department of the Interior, in the appendix.

The Department of Justice said, "Consider it in numbers or consider it in terms of interest."

I wouldn't have any trouble with that, but what I do have trouble with there is that there is nothing said about the interests of the tribes, and nothing is said about the interest of the other Indians who have adjacent lands to whom we also hold a trust responsibility.

Senator CHURCH. I think that is a very good point, and I am sure that sufficient emphasis has been given to it in the course of these hearings which the committee will take into full consideration.

Mr. SONOSKY. Simply this, that the language should be modified to reflect the interest of the tribes because if we can say that the sale of a key tract controlling water would destroy the use of the surrounding land, we must agree it would not be in the interests of the tribes, of the other Indians.

Section 1 does not confer any special right to the tribe that I can find except it does let them participate in the auction line, and if they are successful, to take the land in trust if it is inside the reservation. And where a tribe has its own funds, this right to participate in an auction is satisfactory. But where it does not have its own funds, it must obtain a loan, and under S. 1392, to get such a loan it would be necessary to meet some 8 or 10 conditions that are set out.

Some of my tribal councilmen have read the provisions of S. 1392. You heard some testimony on it. And they expressed the feeling that what this does is give the Secretary of the Interior a dozen statutory reasons for not making the loan.

Tribal councils are recognized as the governing bodies of the tribes for every purpose whatsoever involving sums of money under contracts and leases far in excess of what we are talking about here in terms of loans. Why should Congress now disregard the tribal council, the governing body?

On this referendum I would like to ask why should members of the tribe who do not live on the reservation, who may be spread all over the world and have no interest in it, who probably have gotten rid of their land, why should they have a voice in saying whether or not the tribe should have a loan or shouldn't have a loan?

You know there is a great danger that the man off the reservation can hardly wait to vote, but what he wants to vote for is termination because he is interested in dividing up those tribal assets and getting his pro rata share.

So we say if there is to be a loan program, let it be under such terms and conditions as the Secretary may prescribe, and let us continue to recognize the governing bodies of the tribes.

We think that S. 1392 delves too deeply into details, and when you do that you handcuff and restrict the Secretary where he must have the broadest kind of discretion. I might—

Senator CHURCH. I think that is a very valid point, and I don't have a ready answer for the question you raise with respect to the referendum. We will have to look to that very carefully.

The tribal council, it would seem to me, is the competent governing authority of the tribe for such matters. I can see the need for the requirement for a referendum where a question of termination is involved which would divide up all of the assets of the tribe among all of its members. That is a very different question than the effective management of tribal lands.

I think that you and several other witnesses have done us a good service in pointing this up as one of the deficiencies in the bill.

Mr. SONOSKY. I might say that the Bureau could easily furnish the committee facts concerning the credit standing of tribes. There have been loan programs over many years. Let the Bureau tell the committee how much of a loss the United States has taken from tribes, all loans made by Government bonds.

Well, even with a good loan program, what the tribes want to see in this bill or any legislation is language which would prevent the involuntary sale of land unless—I am talking now about land that the tribe wants to acquire—unless the tribe has funds available to it. Either its own funds or loan funds. In other words, we don't want just language in the statute and then involuntary sales held and the tribes denied any opportunity to buy.

I should like to suggest, too, for the committee's consideration that language be considered to take care of the situation where the tribe and one or more Indians wish to purchase the land for the appraised value. As it now stands, you say the tribe can buy at the appraised value. There was mention made that an individual Indian might want to buy it, an heir, and where there is both we need language to take care of that situation.

I would suggest that in this situation the land should go to competitive bid because it is our fear, based on experience, and that fear has been expressed here, and I can cite examples, that an Indian heir is often used as a dummy or a strawman, a front man for a non-Indian, and he goes in using the non-Indian's money, makes the bid, turns around and transfers the land after he gets the title.

We can prevent this if we give the tribe preferential rights at every step of the way, fully equal with any heir.

I turn now to the prophylactic feature of the bill. That is section 10. This is the one that is going to avoid the problem of fractional heirship by removing the land from the scope of Federal responsibility.

The sum and substance of S. 1392 does that. It solves the problem by avoiding it. It washes its hands of the Federal trust which was guaranteed and laid on these lands, and says: "We no longer will have this fractionated responsibility." And it does this by putting the burden on the Secretary to review every title where the trust goes beyond January 1, 1964, and requires him to terminate unless he finds the Indian owner meets the competency requirement of section 10(b). And if the Indian doesn't satisfy the test, the Secretary can fix, in his discretion, the extension of the trust. And if the Indian is dissatisfied with the Secretary's decision that he is competent, then the Indian can go to Federal court, and the Justice Department expressed the fear this morning that there would be a backlog over and above the backlog the Federal courts have now.

I don't share this fear for this simple reason: I think the language is meaningless so far as providing an effective remedy.

Now just imagine that the Secretary of the Interior finds that an Indian is competent. That Indian would have to hire a lawyer, travel 500, 600, 700 miles in the States to get to the nearest Federal court which meets twice a year, to go to court and tell the court that "the Secretary found me competent, but I want you, Mr. Judge, to

find me incompetent." And the judge is very likely to think to himself: "If he has sense enough to hire a lawyer and find his way over here into the Federal court, he is probably competent enough. The Secretary, *prima facie*, is probably right."

I don't think the remedy is very meaningful, and I think the Indians who are incompetent never would avail themselves of it. You wouldn't reach the people you are trying to protect.

Senator CHURCH. I think that might be likely. It seems to me that with respect to the land, the restricted land that is now held by allottees, that has not yet passed on to heirs, that is to say roughly half of the land is not now involved in heirship problems but will become so unless some kind of a prophylactic treatment, as you call it, is worked out. This land moves into the heirship status upon the death of the present allottee, and perhaps the time to deal with the question of preventing that land from going unnecessarily into an heirship problem is at the time the estate of the allottee is probated, at which time I should think under a proper judicial proceeding a determination could be made as to the competency or incompetency of the heirs.

Mr. SONOSKY. I recognize the problem.

Senator CHURCH. I mean are we going to do anything about it or are we just going to talk about it? And the question is how can we best do something about it, and I can see and feel that you make a strong objection to this deadline date at which time every present allottee is going to be adjudged by the Secretary one way or another, and then the burden upon him to go and prove differently.

I would have to look at that very carefully before I would want to make it a permanent part of any law. But it does seem to me that there is a time, if we really want to do something about this besides fooling ourselves, there is a time when the matter could be taken up in a judicial way and a determination made in each case. That is when the land passes on upon the death of one allottee to a given number of heirs and the estate is probated.

Mr. SONOSKY. I am not denying the need. I am only expressing the fear that in the hands of unfriendly administrators—and as I read S. 1392 with a congressional compulsion on the Secretary to report to Congress. Now he isn't about to have to report to Congress every year on how few heirs he has ruled to be competent. The tenor of the bill seems to be that we are calling on the Department to remove these restrictions. You can't help but get this feeling in reading it. And this concerns us.

Senator CHURCH. That doesn't disturb me at all. As a matter of fact, we ought to all be disturbed at the fact that the problem is growing mammoth and that there hasn't been any compulsion in the law that is meaningfully dealing with the problem and that we are going to have to find some.

The only question that concerns me is fair methods, but there is a crying need for some compulsion that will begin to produce results from the Indian Bureau.

Mr. SONOSKY. That is what concerns us. If you put enough protections and safeguards around us and then put the compulsion on, I think we can get along, but what concerns us is that in the hands of unfriendly administrators—We talk about the Secretary here, you

know, but you know who really is doing this. It is going to be the fellow out in the field at the agency. Some clerk finally gets down to the task of doing it. You are talking about people where personalities are involved. There is a grave danger. We have been through this. And we can cite to the committee horrible examples where past administrations have removed restrictions which never should have been removed.

If we can get the safeguards written into the legislation, then perhaps we can——

Senator CHURCH. That is what we are striving for.

Mr. SONOSKY. Right.

Now I told the committee I wasn't going to criticize without suggesting something affirmative. It seems to the tribes that since Congress is responsible for this mess, as characterized by the chairman, and Congress now is willing to go so far as to appropriate \$50 million under the terms of S. 1392, and considering the tremendous cost to the United States of continuing to administer fractionated heirships, we ought to have a combination of remedies available.

The Secretary ought to have in his arsenal a half dozen remedies so that he could fit them where he needed them, including one which would be a rollback as far as possible to put this fractionated heirship land back into tribal status. And I have outlined five items which I think the committee might wish to consider and which in part are now expressed in the bill.

The first one is voluntary sale, purchase by voluntary sale at the appraised value by the tribe or another owner of the land where no owner objects.

The legislation should authorize the Secretary to represent Indians under legal disability and Indians who cannot be located, including unknown heirs and devisees, after notice by publication following due and diligent search. This satisfies the legal process requirements.

If there is objection by any heir, then the land would go to competitive bid as in the case of the administrative partition.

Now it would be my prediction that if this course is followed most of the land would be sold under this section for the reason mentioned by Mr. Schifter, in our own experience.

You are an Indian; you own a piece of land; you want to sell it; you go to your tribe and you say to the tribe, "My brothers and I want to sell this piece of land to the tribe. We would like to sell it."

The tribe says OK. The land is appraised. You write a check and he has got his money in 30 days. But you go under this administrative procedure and he may have to wait 6 months or as long as a year before the sale is held. So the incentive there is he gets the money quickly. That is why I think most land would go by consent and would wipe out all of these objections arising from lack of consent and judicial process. It is the exceptions that are going to go under the other.

The second point is administrative partition which is in both bills with a preferential right in the tribe and any heir to——

Senator CHURCH. May I ask first of all with respect to this voluntary sale, as you call it. You say that if no owner objects, then let it be sold with approval of the Secretary to any purchaser on any terms?

Mr. SONOSKY. No. To the tribe.

Senator CHURCH. Just to the tribe?

Mr. SONOSKY. Yes, to the tribe at appraised value; just to the tribe.

Senator CHURCH. At appraised value just to the tribe?

Mr. SONOSKY. Yes.

Senator CHURCH. Couldn't that be done now under present law?

Mr. SONOSKY. Yes.

Senator CHURCH. It doesn't require any new law.

Mr. SONOSKY. It can be done now.

Senator CHURCH. Why isn't it happening now?

Mr. SONOSKY. It is happening now except in those cases where you have Indians under legal disability. For example, we have the situation in Standing Rock, and there is a Navajo Indian who has an interest in a piece of land in Standing Rock. This is an actual case. He is a minor. How do we go about getting that minor's consent?

The tribal court, the Navajo tribal court designates a guardian for that Indian, but the State of North Dakota and the State of South Dakota won't recognize that guardianship. So the title wouldn't be any good. The purchaser might not want it. The Secretary of the Interior can't act.

We say give the Secretary of the Interior, by legislation, authority to represent that minor. And then the Secretary can say "Yes, I will agree to this" because the minor's interest may be fifty bucks and it will cost \$250 to get a lawyer and get the guardianship papers for him.

So you have got to have the Secretary do that.

We say if there are unknown heirs or devisees or Indians who after diligent search we can't find, and they have a highly fractional interest or substantial interest, it makes no difference. Give the Secretary, by legislation, the authority to act for him, and then the Secretary can say "Yes, on behalf of these absent heirs whom I can't find—and I have served notice by publication and so forth—on behalf of these Indians under legal disability, I accept this offer of so many dollars for the sale of this land, and it can't be less than the appraised market value."

Senator CHURCH. Would you set up in the bill the publication procedures and the other details?

Mr. SONOSKY. Yes.

Senator CHURCH. Have you any language to suggest to the committee?

Mr. SONOSKY. Yes.

Senator CHURCH. Draft language?

Mr. SONOSKY. I can state it now, I believe.

Senator CHURCH. Well, why don't you submit, in connection with your testimony, the draft proposal for our consideration?

Mr. SONOSKY. I will be glad to do that.

Moving on to the second point, which is administrative partition which I believe, in one form or another, is in both bills, with a preferential right in the tribe and any heir to meet the high bid, or, if there is objection, a right to participate in a limited auction, and again the Secretary should have the same kind of powers—if they are not included in these bills—he should have the same kind of powers I just mentioned with respect to Indian owners under legal disability or those whose whereabouts are unknown.

Senator CHURCH. Let me get the second situation straight.

Is this a case where all of the owners, known owners do not agree? Some of them object to the sale?

Mr. SONOSKY. Or they can't find each other.

Senator CHURCH. Yes. But you don't have the consent of all of the owners, but there may be some who object.

Now to initiate this sale in the second situation would you require a majority of the ownership interest to agree?

Mr. SONOSKY. No, I wouldn't. I wouldn't require a majority of the ownership interest. And I am inclined to believe that it would be satisfactorily solved if we adopted a formula somewhat akin to the one that is in Public Law 85-915 for the Standing Rock Sioux Tribe, or the one which will be before the committee next Tuesday in Crow Creek and Lower Brule, namely, if there are 10 or more Indians, a 25-percent interest. If there are less than 10 Indians, a majority interest.

I would have no objection if the 25 percent interest were reduced to 10 percent. I don't see that that is critical.

If you have a situation where the heirs cannot agree, a multitude of heirs, and if there are safeguards whereby the tribes' rights are protected, I don't see why sale of the land should be withheld because of an inability to pick up the necessary interests.

Senator CHURCH. All right. Then continue with your proposals.

Mr. SONOSKY. The third one—

Senator CHURCH. Complete the second. I want to get the premise upon which you base the second proposal. And would you repeat it.

Mr. SONOSKY. All right.

Let us assume that there are 100 heirs in that situation. Using the 25-percent formula, if one of the 100 heirs happened to own a 25-percent interest in the land, on his application to the Secretary of the Interior to partition the land in kind—and he might as well forget about it in kind; it can't be done—it would go by sale at competitive bid with a preferential right in the tribe and any heir to meet the high bid. It is the same provision substantially as now written.

Senator CHURCH. What about a preferential right in any other member of the tribe?

Mr. SONOSKY. Not in any other member of the tribe, no; just in any heir and the tribe. And throughout I place the tribe in the same status.

Senator CHURCH. There is a competitive bid situation, the kind that S. 1392 contemplates in respect to the highest bidder—with respect to the sale going to the highest bidder subject to such preferential rights as the tribe may have or the heir may have to intervene.

Mr. SONOSKY. And with a preferential right to meet the highest bid unless there is objection. That is not now in 1392. I would add that; preferential right to meet the high bid. Or, if there is objection, then it could go to the auction provision which is now set out in S. 1392.

The third provision deals with judicial partition. In the Secretary's bill provision is made for judicial partition in the situation where an interest in the land is nontrust. It is non-Indian. In that situation the Secretary says that if application is made to him, and if he deems it in the interest of the Indian, partition may be had in the State courts.

I would like to add to that formula a protection to provide, unlike the Secretary's provision, that the United States must be an indispensable party to the proceeding with a preferential right to purchase for the tribe if it so desires, for a preferential right to buy at the high bid at the partition sale in the State court, with a right of removal to the Federal court.

This procedure is one which I draw the committee's attention to, which was used for many years in Oklahoma with pretty fair success, and it is set out in the case of *United States v. Heller* in 322 U.S. 363, and in that case, which was argued before the court, the Supreme Court very lucidly explained exactly why the United States has an interest in this trust property.

I do not agree with the administration viewpoint that once the Secretary deems it shall be to the best interest of the Indians, the United States can wash its hands of the partition proceedings and leave him to the State court. I say that consistently the Secretary must continue to worry about that undivided portion of the land which is in trust. That trust responsibility continues. In no other way can he carry it out.

My fourth suggestion to be contained in the bill—and these are all arrows in the quiver, as I say—is acquisition by eminent domain. I would limit this situation to one where there is an approved tribal consolidation area. In that situation the United States would be authorized to acquire title for the tribe by eminent domain proceedings, and, of course, this is a solution to all problems because it immediately stops the fractionalization. There can never be any title question. And their administrative problem is also solved.

This land that the United States acquired in the condemnation proceeding would then be conveyed to the tribe under an arrangement whereby the tribe would be obliged to repay the United States for the just compensation it paid for the land, and the land would remain subject to the control of the Department of the Interior and under its management if necessary until the loan was repaid to insure—with the legislative provision to insure that the full, fair market rental value of that land was obtained, and I emphasize that because under past practice—I am not ready to accuse the current administration—under past practice Indian grazing land has not been rented for the full fair market rental value but for substantially less.

Mr. Burnette, who testified for the Rosebud Sioux Tribe, was able in large measure to increase the income of the tribe because he did a revolutionary thing of demanding for his tribe the same rental value for tribal grazing land that they were getting outside the reservation, something that the Bureau fixes at a so-called minimum price which delights the non-Indian ranch owners but doesn't help the Indians one bit.

So I say if we use this eminent domain procedure, let that land pay back the United States with interest, and it can pay it back if we get the full fair market rental value.

Senator CHURCH. Doesn't the United States have the right to proceed by eminent domain now, or would this require special statutory authority?

Mr. SONOSKY. I think the power exists, but I think it needs money. It takes money.

The final point I should make concerns the enlargement of management powers if they are needed, and here in this legislation there should be included a provision prohibiting the Secretary from charging this trust land with any debts of the deceased and requiring him to honor these trust patents which in so many words say that the Indian at the end of the trust is to get the land free and clear of all debts, liens, encumbrances, and what not.

This would encourage the Indian to use his land because, as I explained before, as matters stand now he is not much interested in leasing his land if he is not going to be able to keep the proceeds. He is not much interested in selling it if he is not going to get any proceeds out of it.

I wish to thank the committee again for its attention.

Senator BURDICK. Mr. Chairman, I think we are very fortunate to have the knowledge and wisdom of Mr. Sonosky. It comes as no surprise to me, however, Mr. Chairman, because Mr. Sonosky is one of the leading lights from the law school 30 years ago in the University of Minnesota. We were classmates together.

Now the only thing that bothers me—and I think your five points have a great deal of merit—the only thing that bothers me—and I come back to this with other witnesses—where you don't have complete agreement or consent, then in your first three steps your partition ultimately goes to competitive bidding?

Mr. SONOSKY. Partition ultimately goes to whom, Senator? I didn't hear you.

Senator BURDICK. When there is no consent, it eventually goes to competitive bidding.

Mr. SONOSKY. Yes.

Senator BURDICK. You pointed out the necessity of keeping the land base. I agree with you. And if we had piecemeal sales of the land base such as a water area or access area, it would cause the balance of the area to deteriorate in value and use and everything else. What is to prevent—and I think you referred to some people who might make it their business to secure that type of property—what is to prevent them from coming in on competitive bids? Acquiring these water areas and access roads and everything else?

Mr. SONOSKY. The quick answer to your question is "Nothing." But before we get to that we must remember this, that you are dealing here primarily with members of the tribe, and I speak now from experience. A committee from the tribe, the land committee will wait on the individual Indian concerned, and they talk to him and encourage him to sell his land to the tribe at the appraised value. And it is the exception, Senator, that reaches this stage of competitive bidding. And again it is the exception where you find this non-Indian who is interested. But in that situation I see no alternative except for the tribe to go in and fight.

Now this has happened, for example, on Rosebud, and we have had to pay on Rosebud—I believe Mr. Burnette can support me on this—as much as \$8,000 or \$9,000 to get out a non-Indian who was trying to bust a tribal grazing unit for a piece of land that was appraised in the area of \$3,500. But we did it. We had to. What is the alternative?

Senator BURDICK. And that is the reason why you have the proviso that the tribe should be able to meet the high bid?

Mr. SONOSKY. Right.

Senator BURDICK. And you think that would be adequate to take care of that unusual situation should it occur?

Mr. SONOSKY. Unless there is an objection, I think it would be adequate. There are always going to be objections to these, but we have to deal with the overall.

Senator CHURCH. You have got one added protection there, and that is you are not going to have a sale in the first place unless the Secretary finds that it is in the interest of the owners and also in the general interest of the Indian tribe.

Mr. SONOSKY. Yes. With that written into the legislation the odds are the Secretary would not permit that Indian to sell that piece of land. That has happened.

Senator CHURCH. It would have a disruptive effect on the other—

Senator BURDICK. In my hypotheses I stated this was a case where there was disagreement or lack of consent situation.

Mr. SONOSKY. Yes. And the Secretary—let us say we had a Secretary who did permit the land to go. Then my answer would follow.

Senator BURDICK. Mr. Chairman, I trust the committee will give great consideration to these recommendations of Mr. Sonosky.

Senator CHURCH. We will indeed, Mr. Sonosky. Your testimony has been very helpful, as has that of the other witnesses through the day and through yesterday.

I want to thank you all for coming. I want to thank you for your patience, those of you who had to wait so long to have a chance to testify.

Is there anybody else here who wants to testify at this time who hasn't been scheduled?

This hearing will be closed with the understanding that the record will be kept open for 7 days for those who want to complete their testimony and file supplementary papers.

Thank you very much.

(Whereupon, at 4:10 p.m., hearings by the subcommittee were concluded.)

Mr. Secretary, I think that you think that would be adequate to make
any of that kind of statement should it occur.
The Secretary, I think that is an offer, and I think it would be wise
that there are always going to be objections to this, but at the same
time with the result.
I am not going to have a sale in the first place unless the Secretary
says that it is in the interest of the owners and also in the general
interest of the Indian tribes.
The Secretary, I think that is a question into the legislation, the only
one the Secretary would not permit that Indian to sell that interest
land. I think that happened.
The Secretary, I think that would have a disastrous effect on the other
Secretary, I think that is a hypothesis, I think that is a hypothesis.
There was disagreement, a lack of consent situation.
Mr. Secretary, Yes. And the Secretary, let us say we had a
Secretary, who did permit the land to go. Then my answer would
be, I think that the Secretary, I think the committee will give
some consideration to those recommendations of Mr. Secretary.
The Secretary, I think that will be the case. I think that the
has been very helpful in the matter of the other interest, through the
day and through the Secretary.
I want to thank you all for coming. I want to thank you for your
presence. I think that you all had to wait so long to have a chance to
speak.
I think that the Secretary, I think that was to be the case at the time when
I was here.
The Secretary, I think that will be closed with the meeting and that the report
will be kept open for 7 days for those who want to participate
in the meeting and the supplementary papers.
I thank you very much.
Whereupon, at 4:10 p.m., the meeting of the subcommittee was
concluded.

APPENDIX

(The following communication and enclosures were subsequently submitted by the Department of the Interior in response to a request concerning liens on Indian lands arising out of assistance programs under the Social Security Act.

DEPARTMENT OF THE INTERIOR,

OFFICE OF THE SECRETARY,

Washington, D.C., August 16, 1961.

HON. FRANK CHURCH,

Chairman, Indian Affairs Subcommittee, Interior and Insular Affairs Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR CHURCH: At the hearing on August 9 concerning S. 1392, the Indian heirship bill, you requested that the subcommittee be supplied with an explanatory statement about the extent of liens attached to restricted Indian lands by States, arising from the categorical assistance programs under the Social Security Act.

Under the Social Security Act, Federal funds are made available to States for a substantial part of the costs of their public assistance programs, which include old age assistance, aid to dependent children, aid to the blind, and aid to the permanently and totally disabled. The States have primary responsibility for the initiation and development of their programs; but if a State wishes to receive Federal funds, it must have a plan which is approved by the Department of Health, Education, and Welfare as meeting the requirements set forth in the Social Security Act.

Within the conditions for grants-in-aid established by the public assistance titles of the act, the States have wide latitude in deciding how the programs are to be organized and administered, who is eligible for aid and how much aid an eligible person shall get. Therefore, there are differences as well as similarities between the States' programs. The programs reflect economic conditions in the States and the desires of the citizens as expressed in law and in policy.

A State plan sets forth State laws, regulations, and policies. One of the conditions for approval of the State plan is the requirement that, in determination of the need of a claimant for assistance, consideration must be made to any income and resources that he may have (with exemption of up to \$50 a month of earned income in aid to the blind). Many States, including the States listed below that have a considerable Indian population, include in the State plan provisions governing recoveries of assistance through methods such as a claim or lien on the property of a recipient of public assistance. Indian applicants for assistance are required to agree to the same lien provisions as non-Indians. Otherwise assistance would not be granted. However, the Indians are favored to this extent, the trust property of an Indian is not disposed of after his death to repay assistance given, as may be done in non-Indian cases, but only the income from the property in trust status is used. The States with considerable Indian population having some form of lien provision include Idaho, Minnesota, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, Wisconsin, and Wyoming.

It has been held in the Department of the Interior that the claims against a deceased Indian's restricted estate by States on account of old-age assistance payments are properly given priority over the claims of general creditors. The Department has ruled that such claims may be paid not only from income from restricted land to the credit of the estate at the time of the decedent's death but also from such income accruing to the estate subsequent to the death of the decedent. Enclosed is a copy of an opinion from the Office of the Solicitor in this connection.

Because income from many restricted estates has been limited, the Department of Public Welfare in South Dakota has shown willingness to compromise claims by accepting income from restricted land for a stated number of years. There may be other States which have made similar concessions in individual cases. In the State of Montana a certificate of indebtedness of a recipient of assistance is filed as a lien of record. The Department of the Interior has considered that such liens are not really enforceable against Indian restricted land. The Department has held that while the Indian should be encouraged to discharge all indebtedness to which he voluntarily binds himself, he cannot, in the absence of congressional authority, be placed in the position of losing his interests in trust lands through foreclosure of a statutory lien based solely on a law of the State. Enclosed is a copy of an opinion from the Office of the Solicitor to this effect.

We do not have information regarding the amount of funds being paid to State welfare departments because of liens against the estates of deceased recipients of public assistance. Such repayments are handled by our agency offices through individual accounts, and are not segregated in any special statistics.

In the event your subcommittee finds the existing situation objectionable and considers that the property obligations of Indian recipients of assistance should be different from the obligations imposed on non-Indian recipients of assistance under the Social Security Act, we will endeavor to collect data from the field offices concerning the number and amount of liens. This will take some time, however.

Sincerely yours,

JOHN A. CARVER, Jr.,
Assistant Secretary of the Interior.

STATE SOCIAL SECURITY CLAIMS AGAINST RESTRICTED INDIAN ESTATES

Act of June 25, 1910—Restricted Indian estates; payment of claims; administrative practice; congressional recognition.

Under the act of June 25, 1910, as amended, providing for the determination of heirs and the approval of wills of deceased Indians who have left trust or restricted estates, the Secretary of the Interior has implied authority to allow all just claims against such estates.

Having been recognized by the Congress, the departmental practice of allowing claims against trust or restricted Indian estates has in effect received the approval of that body.

The Secretary of the Interior may, in his discretion, determine what income from trust or restricted Indian estates shall be applied in payment of claims against the estates, and a regulation which permits such claims to be paid from any income which may accrue from the decedent's trust or restricted property after his death is valid.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., June 2, 1952.

Memorandum.

To: The Commissioner of Indian Affairs.

From: The Solicitor.

Subject: State social security claims against restricted Indian estates.

This responds to your memorandum requesting an opinion on the question whether there is adequate statutory authority to support the departmental practice which permits the settlement of State claims for reimbursement of social security or old-age assistance payments to an Indian allottee out of income derived from the decedent's allotment after his death. (See 25 CFR 81.25.)

The jurisdiction of the Secretary of the Interior over the trust or restricted estates of deceased Indians, including the determination of heirs and the approval of wills, is based upon sections 1 and 2 of the act of June 25, 1910, as amended (25 U.S.C., 1946 ed., secs. 372, 373). Section 1 of the 1910 act, as amended, provides in pertinent part that:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice

and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *

Section 2 of the 1910 act, as amended, provides, so far as relevant here, that: "Any persons of the age of 21 years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior * * *"

While the 1910 act provided in so many words only for the ascertainment of heirs and the approval of wills, and did not expressly grant to the Secretary the power to allow or disallow claims against the trust or restricted estates of deceased Indians, the practice of considering and allowing claims against the estates of deceased allottees was almost immediately instituted.¹ The regulations of September 13, 1915, and June 19, 1923, relating to the determination of heirs and the approval of wills provided in sections 14 and 9, respectively, for serving notices of hearing on "claimants" as well as on "presumptive heirs." Detailed provisions relating to the handling of claims were contained in sections 46, 47, 48, and 49 of the regulations on the same subject promulgated May 31, 1935, which preceded the present regulations.

The propriety of paying claims against the trust or restricted estates of Indians has been recognized in recent years by two Solicitors of the Department, who expressly stated that such claims might be paid not only from income to the credit of the estate at the time of the decedent's death but also from income accruing to the estate subsequent to the death of the decedent.²

It is clear that the 1910 statute confers upon the Secretary of the Interior an implied power to allow claims against trust or restricted Indian estates. As the Supreme Court said in an early case, *United States v. Macdaniel* (7 Pet. 1, 14 (1883)), in speaking of the duties and responsibilities of the head of a department of the Federal Government: "He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does."³ The exigencies of Government in more recent times have led to the enactment of many statutes which merely lay down broad general policies or objectives and leave it to the executive to fill in the details. The lacunae of the 1910 act in particular have had to be filled in by administrative practice. For example, section 1 of the act did not expressly confer upon the Secretary of the Interior the power to ascertain the heirs to Indian allotments which were patented in fee but held subject to restrictions against alienation; yet the power of the Secretary to do so was upheld in *United States v. Bowling*, 256 U.S. 484 (1921). On the authority of that case, the Department held that the Secretary had the power to determine the heirs to lands which had been purchased with restricted funds, and had been subjected by the Secretary to restrictions against alienation.⁴ Moreover, although section 1 (unlike section 2) of the 1910 act does not expressly give the Secretary jurisdiction over Indian trust funds, it has been the uniform practice of the Department to determine the heirs to such funds as an incident of the power to determine the heirs to the lands from which such funds are derived.⁵

The implied power to allow claims against trust or restricted Indian estates is readily deducible from the terms of the 1910 act. A rulemaking power is

¹ See *Grace Cox et al.*, 42 L.D. 493, 501-502 (1913), where it was said apropos of claims: "Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate."

² See letter dated June 20, 1940, from Solicitor Margold to the Solicitor of the Department of Agriculture, and letter dated Sept. 28, 1944, from Solicitor Harper to Senator Harlan J. Bushfield of South Dakota.

³ See also *Rainbow v. Young*, 161 Fed. 835 (C.C.A. 8th, 1908); *William Small, Executor v. United States*, 45 Ct. Cl. 13, 17 (1909); 34 Op. Atty. Gen. 320, 326 (1924).

⁴ See 49 L.D. 414 (1923).

⁵ The propriety of this practice was inferentially recognized in the act of Jan. 24, 1923 (42 Stat. 1185, 25 U.S.C., 1946 ed., sec. 377), which provided for the collection of fees by the Secretary of the Interior for the cost of the work performed by him in determining the heirs to any trust or "restricted Indian property" or in approving wills covering "restricted property" and which authorized the fees to be collected "from any trust funds belonging to the estate of the decedent."

expressly conferred upon the Secretary of the Interior by both sections 1 and 2 of the act, and this rulemaking power necessarily carries with it the authority to utilize all proper means for effectuating the purposes of the act.⁶ Now, conceivably, if creditors could, without the assistance of the Secretary of the Interior, collect debts which Indians had incurred before their deaths but which remained unpaid at the time of their deaths, it might be possible to argue that the power of the Secretary to see that such debts were paid was not necessarily to be implied from his power to ascertain the heirs or approve the wills of the debtors. Section 1 of the 1910 act expressly declares, however, that the decision of the Secretary in this respect "shall be final and conclusive;" and, although section 2 of the act contains no such express declaration, wills devising trust or restricted Indian property cannot be probated in the courts.⁷ As the jurisdiction over the trust or restricted estates of Indians is thus vested in the Secretary, their creditors cannot resort to the courts to collect their debts; and if these were not paid at the direction of the Secretary of the Interior, the creditors would be left without any remedy. It is hardly to be assumed that the Congress intended to make itself a party to such dishonesty.

So far as concerns the allowance of claims against the estates of Indians who have left wills, there is an additional factor which supports the power of the Secretary. Indian testators almost invariably direct that their just debts shall be paid. Thus, the Secretary, in allowing claims against their estates, is only carrying out their express wishes.

In recent years, Congress has recognized that the Secretary of the Interior was exercising a general probate jurisdiction with regard to the trust or restricted estates of deceased Indians. In adopting the act of July 8, 1940 (54 Stat. 746, 25 U.S.C., 1946 ed. sec. 372a), which regulates the adoption of children by Indians who own trust or restricted estates, Congress provided that the statutory procedure should apply to "probate matters under the exclusive jurisdiction of the Secretary of the Interior * * *," and, even more significantly, that the act should not apply to "the distribution of estates of Indians who have died prior to the effective date of this act." The distribution of an estate clearly includes the allowance of any just claims against the estate. Moreover, in providing in the act of November 24, 1942 (56 Stat. 1021, 25 U.S.C., 1946 ed., secs. 373a-373c) for the disposition of the trust or restricted estates of Indians who died intestate without heirs, Congress expressly declared that the estate should escheat only "subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate * * *."

The legislative history of the act of November 24, 1942, is particularly interesting as a test of congressional sentiment on the question of the payment of creditors' claims against Indian estates. In its original form, the bill (H.R. 4533, 77th Congress) which became the act of November 24, 1942, made no express provision for the payment of creditors' claims. Indeed, it was couched in such phraseology that it seemed to exclude the payment of any creditors' claims. Thus, it provided:

"That upon final determination by the Secretary of the Interior that the Indian holder of a trust or restricted allotment of lands or an interest therein has died intestate without heirs, the land or interest, together with all accumulated rents, issues, and profits therefrom held in trust for the decedent, shall escheat to the tribe owning the land at the time of allotment."

When the bill came up for consideration in the House on May 19, 1941, Congressman Case of South Dakota objected to the bill. "The bill, as I read section 1," he pointed out "provides that not merely the land but all the accumulated rent, issues, and profits therefrom held in trust for the decedent shall escheat to the tribe owning the land at the time of the allotment. It occurs to me that

⁶ As the Supreme Court said in *Hallowell v. Commons* (239 U.S. 506, 508 (1916)), the Secretary in promulgating regulations under the act has "considerable discretion as to details."

⁷ As the Supreme Court said, in speaking of the words of sec. 2 of the 1910 act in *Blanet v. Cardin* (256 U.S. 319, 326 (1921)): "They not only permit a will but define its permissible extent, excluding any limitation or the intrusion of any qualification by State law." It then added that "the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it * * *."

many times when Indians die under this circumstance claims against the estate of the Indian could not be taken care of. I find no provision in the bill that would permit the settlement of the claims before the property, the rents, and so forth, go to the tribe." To this Congressman Rogers of Oklahoma, who had introduced the bill at the request of the Department, replied: "That is under the supervision of the Secretary. The estate would have to be settled before any of it would revert."⁸ Still dissatisfied with the language of the bill, however, Congressman Case asked that the bill be passed over, and on June 16, 1941, he offered an amendment expressly providing for the payment of creditors' claims, and this amendment was adopted by the House.⁹

It might be contended that the departmental practice in the matter of allowing claims against trust or restricted Indian estates runs counter to the provision in section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 389), as amended (25 U.S.C., 1946 ed., sec. 348), which states that at the expiration of the trust period of an allotment the United States will convey the same "free of all charge or encumbrance whatsoever," and to a related provision in the act of June 21, 1906 (34 Stat. 327, 25 U.S.C., 1946 ed., sec. 354), which states that no allotted land shall become "liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor." Even conceding, for the sake of argument, that these provisions would preclude the allowance of claims against the estates of allotted Indians, it is clear that they have, in effect, been set aside by the later adoption of the act of June 25, 1910, which, properly construed, permits the allowance of such claims. The General Allotment Act, to be sure, attempted to forbid the alienation or incumbrance of allotted lands in any manner during the trust period, but this policy was soon abandoned, and all sorts of transactions affecting allotted lands were subsequently authorized by a long series of congressional enactments. The allowance of creditors' claims against trust or restricted estates is only another example of such an authorization.

It might also be contended that even if claims against trust or restricted Indian estates may be allowed from cash on hand at the time of the decedent's death, such claims cannot be allowed from the rents, profits, or income of the decedent's lands accruing after his death. If, however, the Secretary of the Interior has authority to allow claims against Indian estates, the question of the time of the accrual of the income to be applied to the satisfaction of a claim is to be determined entirely in his discretion. It is true that it is the rule generally that the rents, profits, and income derived from realty vest in their heirs or devisees of the decedent and are not assets in the hands of an executor or administrator, but this rule does not apply where the personality is insufficient to pay the debts of the estate. Moreover, in many States the general rule has been altered by statutes which make subsequently accruing rents and profits from realty assets in the hands of personal representatives for the payment of debts.¹⁰ In any event, the Secretary of the Interior is not bound by these rules of State law, for under section 5 of the General Allotment Act (25 U.S.C., 1946 ed., sec. 348), he is bound by State law only in his determination of heirship.

I am of the opinion, therefore, that the regulation of the Department which requires the allowance of claims of States on account of social security or old-age assistance payments, and which gives such claims priority over the claims of general creditors, has an adequate statutory basis.

It is possible, however, that in some instances the application of the regulation may cause undue hardship. You may wish to reconsider the policy question whether or under what circumstances income accruing to trust or restricted Indian estates subsequent to the death of the decedent should be used to pay State social security claims, with the idea of perhaps proposing a change in the regulation.

MASTIN G. WHITE, *Solicitor*.

⁸ See Congressional Record for May 19, 1941, p. 4316.

⁹ See Congressional Record for June 16, 1941, pp. 5314-5315.

¹⁰ See 33 C.J.S., title "Executors and Administrators," sec. 105, and authorities there cited.



DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., November 29, 1956.

Memorandum.

To: Commissioner of Indian Affairs.

From: Associate Solicitor, Indian Affairs.

Subject: Use of approved mortgages or certificates of lien on Indian trust lands as a method of enforcing the reimbursement of public assistance grants to Indians in Montana.

In a memorandum dated July 6, 1956, you requested an opinion on the question whether the Commissioner of Indian Affairs has authority to approve Indian mortgages and/or voluntary certificates acknowledging indebtedness for public assistance received from the State of Montana.

It is the opinion of this Office that, while as a matter of law the Secretary of the Interior has authority to approve Indian mortgages pursuant to the act of March 29, 1956 (70 Stat. 62), no action is required to be taken by the Commissioner of Indian Affairs to request the Montana Welfare Board to substitute such mortgages in lieu of a certificate of indebtedness which when filed under Montana law (ch. 228, Sess. Laws, 1953) constitutes a lien against real property situated in that State. The lien provisions of the Montana law do not apply to trust or restricted Indian lands. Further, that law does not require a welfare client to execute a mortgage on real property owned by him as a condition precedent to the receipt of public assistance. There is no reason, therefore, why an Indian should be required to encumber his lands with a mortgage for such purpose.

In Solicitor's opinion M-36121, dated June 2, 1952, this office had under consideration the regulation of the Department, 25 CFR 81.25, which directs the allowance of claims of States on account of social security or old age assistance payments, and which gives such claims priority over the claims of general creditors. The opinion held that income accruing to trust or restricted Indian estates subsequent to the death of the decedent might be used to pay State social security claims. In holding that the act of June 25, 1910 (25 U.S.C. 372, 373), vested an implied power in the Secretary to allow such claims against trust or restricted Indian estates, the opinion at page 8 states:

"It might be contended that the departmental practice in the matter of allowing claims against trust or restricted Indian estates runs counter to the provision in section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 389), as amended (25 U.S.C. 348, 1946 ed.), which states that at the expiration of the trust period of an allotment the United States will convey the same 'free of all charge or encumbrance whatsoever,' and to a related provision in the act of June 21, 1906 (34 Stat. 327, 25 U.S.C., 354, 1946 ed.), which states that no allotted land shall become 'liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.' Even conceding, for the sake of argument, that these provisions would preclude the allowance of claims against the estates of allotted Indians, it is clear that they have, in effect, been set aside by the later adoption of the act of June 25, 1910, which, properly construed, permits the allowance of such claims. The General Allotment Act, to be sure, attempted to forbid the alienation or encumbrance of allotted lands in any manner during the trust period, but this policy was soon abandoned, and all sorts of transactions affecting allotted lands were subsequently authorized by a long series of congressional enactments. The allowance of creditors' claims against trust or restricted estates is only another example of such an authorization."

That opinion, however, did not touch directly upon the question presented here, viz, whether the Commissioner of Indian Affairs may approve or recognize a lien other than a mortgage on trust or restricted Indian land during the lifetime of a public assistance recipient prior to or at the time of the issuance of a patent in fee.

It is our opinion that the act of March 29, 1956, supra, merely clarifies and makes definite the authority of the Secretary of the Interior or his duly authorized representative to approve mortgages already given. The statute does not increase or expand such authority. It was enacted so that Indian landowners might avail themselves of the services of commercial lending organizations which require statutory language authorizing the encumbrance of Indian trust and restricted land by mortgage.

While the Indian should be encouraged to discharge all indebtedness to which he voluntarily binds himself, he cannot, in the absence of congressional authority, be placed in the position of losing his interests in trust lands through foreclosure of a statutory lien based solely on a law of the State.

It is our opinion that the State of Montana has adequate means for its protection in such matters as a preferred creditor under the regulations of this Department found in 25 CFR 81.25.

W. H. FLANERY,

Associate Solicitor, Indian Affairs.

INTERPRETATION OF ACT OF MARCH 29, 1956 (70 STAT. 62), AS TO USE OF APPROVED MORTGAGES OR CERTIFICATES OF LIEN ON INDIAN TRUST LANDS FOR ENFORCING REIMBURSEMENTS OF PUBLIC ASSISTANCE GRANTS IN MONTANA TO INDIANS

STATUTORY INTERPRETATION: ADMINISTRATIVE

The act of March 29, 1956 (70 Stat. 62) clarifies and makes definite the authority to approve mortgages given the Secretary of the Interior and his duly authorized representative under prior acts. Certificates of Indebtedness giving rise to a State statutory lien against real property for public assistance granted are not deemed to be mortgages which may be approved under authority of this act.

[For release August 9, 1961]

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

Information Service

INTEREST RATES LOWERED ON REVOLVING LOANS TO INDIANS

A substantial reduction in interest rates charged on loans from the revolving fund of the Bureau of Indian Affairs, in line with recommendations of the Task Force on Indian Affairs for economic development on Indian reservations, was announced today by Secretary of the Interior Stewart L. Udall.

The most important reduction is from $4\frac{1}{2}$ to 2 percent on loans to tribes for land acquisition. This ties in with the task force finding that a serious deterrent to more adequate use of Indian resources is the divided ownership or "heirship" status of numerous tracts that were allotted years ago to individual Indians.

Tribes which had received land-purchase loans at the old rate of $4\frac{1}{2}$ percent found it difficult to work out programs for acquiring these "heirship" tracts on terms that would permit repayment of the loans within a reasonable period. The new rate of 2 percent will permit land purchase and consolidation programs to be undertaken which were not possible at the old rate, Secretary Udall said.

Another important change is in the rate of loans to tribes to finance business enterprises. A uniform rate of $4\frac{1}{2}$ percent has been charged in the past. The new regulation will permit a rate as low as 2 percent and as high as 5 depending upon the income-producing ability of the enterprise, and the benefits it will bring to Indians. The new rate should prove helpful in the development of new business enterprises which use reservation resources and provide employment for tribal members, the Secretary declared.

Indian young people receiving loans for educational purposes also will get some relief under the new revolving credit regulations. Up to the present time, interest has been charged on such loans from the time they were made. This has worked a hardship on many borrowers because interest accrued during the educational period. Upon graduation they were faced with large debts, much of which represented interest accruals. The new regulation provides that interest accrual will not begin until 1 year after completion of the course for which the loan was made.

The rate of loans to individual Indians for agricultural operating expenses is also being reduced from 6 to 5 percent, and the new regulations provide greater flexibility in the rate charged cooperative associations. In the past, cooperative associations have been charged 5 percent a year. The amended regulations will permit rates ranging from 2 to 5 percent according to the nature of the cooperative's business.

The Department pointed out that since the currently authorized amount of \$10 million for the revolving fund is inadequate to meet the demands of Indians for loans, the effectiveness of the new regulations in stimulating greater economic development on reservations will depend largely on enactment of pending legislation to increase the size of the fund.

The new loan rates become effective on publication in the Federal Register.

[Telegram]

COULEE DAM, WASH., August 9, 1961.

HON CLINTON P. ANDERSON,
Chairman, Interior and Insular Affairs Committee, U.S. Senate, Washington,
D.C.

DEAR SIR: We learned last evening that unrevealed delegation consisting of three members of the Colville Business Council and their illegally appointed attorney, Lyle Keith, are not in Washington pretending to represent the Colville Tribes on matters of which we are not informed. In view of the facts that hearings are to be held before the Senate committee on August 9 on heirship lands, Senate bill 1392, and the Interior Department's substitute bill, House bill 8077, we believe that the Senate bill is a reasonable approach to this perplexing problem, but the Department's bill in our judgment is a deception and an attempt to add more lands to Indian reservations thereby perpetuating Indian reservations, continued segregation of Indians from other citizens, prolong the Indian Bureau system, and stifle legislation for terminating Federal supervision over Indians. We suspicion that these men will also attempt to induce committees of Congress to pass Senate bill 2123 and House bill 8236. The tribes have not been afforded an opportunity to reject it. At a meeting on July 8 the business council and Lyle Keith refused to take this bill up for consideration. We oppose the provisions which will give the business council and the Indian Bureau authority to expend money for any purposes which they may determine. Please do not consider these bills until tribes have had opportunity to consider same.

COLVILLE INDIAN ASSOCIATION.
FRANK W. MOORE, *President*.

[From the Lewiston (Idaho) Tribune, Mar. 23, 1916]

TRIBE FAVORS LAND BILL

LAPWAL.—A Senate bill introduced Tuesday by Senator Frank Church, Democrat, of Idaho, to unravel heirship problems on Indian trust land was praised Wednesday by Richard Halfmoon of the Nez Perce Tribal Committee.

"We think it would be the best thing that has happened in this field because it would solve a lot of fractionated heirships," Halfmoon said.

Failure of the original recipients of the trust land, and also of the heirs, to leave wills distributing property was blamed by Halfmoon for creating the problem. Under existing law, the property must be equally divided among surviving heirs where no will is left. Some of the original tracts, Halfmoon said, now have become so small that some persons receive as little as 10 or 20 cents a year for their share of income from the land.

Halfmoon said the bill would authorize the person with the largest share in any parcel of land to buy the rest of the shares and thus bring more order to the handling of Indian land.

The tribal committee chairman said he was sure other Indian tribes in the Northwest would support its passage.

WENATCHEE, WASH., June 7, 1961.

HON. HENRY M. JACKSON,
U.S. Senate, Washington, D.C.

DEAR SIR: Reference is made to S. 1392, relating to the Indians heirship land problem. This bill is not a practical solution to the problem and is, in reality, an absolute infringement of human rights, the very basis upon which our American freedom was founded and I feel it is my duty, as a freedom-loving person, to call your attention to the matter.

The only difference between the provisions of this bill and Castroism is that, Castro openly confiscated property from the rich to distribute to the poor, whereas, with the passage of this bill, we will compel the poor to yield their lands to the vulturous greeds, an offense with a far greater intrusion of moral justice than the communistic tactics which we so vehemently condemn.

The bill has every earmark of denying its subjects, the freedom-loving privilege of choice, consent or consultation, an act in itself common to Hitlerism and communism.

These unfortunate victims of circumstances, through no fault of their own, who are at the mercy of their plight, are after all, Americans too, who should be enjoying the freedom and the liberties as guaranteed other Americans. The vicious motive of this bill can only be described as an act of hypocrisy with a first-degree mockery of democracy. Its demoralizing effect will no doubt serve to accelerate the deteriorating opinions of our form of government by the rest of the freedom-loving peoples of the world.

Instead of confiscating their constitutional and heritage rights, let us examine the facts and correct the root of the situation in a democratic way. The American taxpayers placed the responsibility and the duty to educate, cultivate, and prepare our Indians for citizenship in the trustful hands of the Indian Bureau. This Department of our Government, with its multitude of bureaucrats, armed with special legislation, all financed through taxation for approximately a century now, still has not solved the problem. The solution to the problem was simple and yet the Indian Bureau has unmercifully failed its duty and purpose and the tragedy of the incapable Indians still remain. Why? It certainly wasn't the fault of the Indians that they, victims of their plight, cannot yet manage their affairs. It would appear that the Indian Bureau needs revamping. Their outmoded policies and outdated tactics should be regeared to concentrate more on the acceleration of the process of cultivation. It is simple as that, and yet the shifting and shirking of responsibilities of the Indian Bureau and the congressional bigwigs continues year after year, while the complexity of its problems multiply and our helpless Indians are swept along with its unmerciful undertow, lost in its magnitude of changing times.

This bill, if it passes, will directly and indirectly force mass confiscation of property from its rightful owners against their will. This practice is a common principle of imperialism and it should not be introduced into our society and our Government.

I urge your cooperation to kill this bill and instead insist on a practical sound solution to the problem. Let us prepare and teach the Indians to take care of their affairs first, before we cut them off at the heels. It is a democratic duty and obligation to preserve and observe the principles of freedom, not destroy such segments of its principles to quench our perversions.

Respectfully yours,

A. E. HALLOW.

DELLWO, RUDOLF & GRANT,
Spokane, Wash., June 1, 1961.

Re S. 1392.

Hon. FRANK CHURCH,
U.S. Senate, Washington, D.C.

DEAR SENATOR: I am in receipt of your letter of May 20, 1961, and the accompanying booklet that you transmitted generally through the mail asking for comments regarding S. 1392.

You will recall that S. 1392 is the one introduced by you which is presented as a bill to solve the problem of fractionated heirships.

I have discussed this with the two tribes I represent, the Coeur d'Alenes and the Spokanes, and must say that I am personally somewhat shocked over the form and manner of the proposal of this bill. I think that I am fairly well informed on Indian affairs. When I received your material, I hastily read through the various explanations respecting the bill and it was only on the second reading that I discovered the full import of section 10 and its subsections. To me it is shocking that provisions which bear on the eventual termination of the trust status of individually held Indian lands should be perfunctorily included in a fractionated heirship bill. The Indians have been plagued with this type of legislation for many years. In legislation for some needed object there has frequently been included something additional of little relevance which almost pulls the rug out from under the Indian tribes.

As I read section 10, it completely terminates the trust status of individually held Indian restricted land on or before 1964. The only exception is the positive finding by the Secretary of the Interior of basic incompetence by the individual Indian. And to make it doubly certain that the object of the bill will be fulfilled, it in effect provides that unless the Secretary positively finds the incompetence the trust shall cease, and it shall only exist in individual cases where incompetency is found.

As it stands now there must be a combination of a request for fee title and a finding of incompetence. History will show that the same thing was tried in the early 1920's. Fee titles were thrust onto Indians left and right. In most instances the Indians did not realize that they had received fee patents until the sheriff came to evict them at the conclusion of the sheriff's sale for nonpayment of taxes or other debts. As I recall, there was a period of examination of conscience by Uncle Sam and in many instances there was a reallocation of land. Since that time the Government has been quite slow in granting fee patents and has never thrust them upon Indians as an administrative routine, but only upon formal application and approval.

In this instance (S. 1392) it is obvious that merely by lapse of time, and, by failure to find incompetency, fee titles will automatically occur. I wonder if, as a Senator from the State of Idaho, but perhaps without the opportunity to have special experience in the field of Indian affairs, you and your subcommittee fully appreciate the effect of fee patents and fee titles which will result from this legislation.

Far beyond merely appearing to correct problems of heirship, which are only transferred to the State and still will exist, it will result in a complete loss of immunities that are inherent in Indian status. The lands will be taxed by the States and the income by the United States. Lands also will be subject to attachment for debts; all restrictions as to encumbrance, liens, transfers, and sales will disappear. Individual Indians with fractionated interests will have the right to sell their fractionated interests; partition actions would result in State courts and the whole problem of Indian lands would be transferred from the Federal Government to the State authorities. Further there are many rights that are contingent on Indians living on trust properties. In many instances hunting, fishing and public health rights carry that as a requirement.

Here we have an effort for termination of trust status of Indian lands camouflaged in an heirship bill. We have the tail wagging the dog, and the tail presented as being the whole dog; namely, a bill to correct heirship problems.

Section 10 is the major legislation, not the heirship legislation. If your subcommittee would like to present legislation to terminate the trust status of Indian allotments, it should do so as a separate major bill which will be fairly presented for public debate and controversy. I assure you it would have to withstand the concerted attack by every official and semiofficial Indian group I know of.

In conclusion let me say that the only reason S. 1392 will pass without all the Indian forces having been mobilized in opposition will be because it succeeds in its deceptiveness; namely in concealing radical termination features under another heading. As a personal aside, and not meaning that this comment represents the tribe but only my personal view, I want to conclude by saying that if this is the type of legislation going to emanate from the New Frontier I will be ashamed to quote again the plank in the Democratic platform and Kennedy's statement with regard to Indian affairs and problems and the recent speech of April 17, 1961, by John Carver. I would be afraid that somebody in the audience would ask me how this type of legislation is consistent with those ringing statements of principle to which I have alluded.

Respectfully submitted.

ROBERT D. DELLWO.

BUFFALO GAP, S. DAK., June 1, 1961.

HON. FRANK CHURCH,
Committee on Interior and Insular Affairs,
Washington, D.C.

DEAR SIR: This is in regard to reservations, Indians, and with their heirship lands, and which we like to ask you and the Congress to fix it so that an individual heir could sell and not only to the tribe but include non-Indians here, State as well; and please urge this along because this deal it has been hanging

fire for a good many years and we must remember this, they say this human life is limited. OK, and I thank you.

Respectfully,

RIENZOL DILLON, *World War I Veteran.*

JULY 1, 1961.

To: Hon. Frank Church, U.S. Senator, Senate Office Building, Washington, D.C.
From: Black Hills Treaty and Claims Council organized under the act of April 29, 1868; ratified on February 16, 1869; and proclaimed February 24, 1869 (15 Stat. 635, 640, and the act of July 20, 1867), Pine Ridge Indian Reservation, July 1, 1961.

DEAR SENATOR CHURCH: We, the undersigned, with great knowledge and respect, do hereby endorse S. 1392, introduced before the U.S. Senate.

Therefore, we urge the U.S. Congress do pass the bill without amendment to become public law.

Very respectfully,

FRANK KILLS ENAMY,
Chairman, Chief,
Kyle, S. Dak.

JAMES HOLY EAGLE,
Secretary and Treasurer, Veteran,
Allen, S. Dak.

FRANK SHORT HORN,
Special Assistant, Veteran,
Porcupine, S. Dak.

STATE OF IDAHO,
DEPARTMENT OF EDUCATION,
Statehouse, Boise, May 25, 1961.

HON. FRANK CHURCH,
U.S. Senate, Washington, D.C.

DEAR FRANK: We were pleased to receive your bulletin on the Indian heirship land survey. Mr. Harold Farley, who is in charge of Indian affairs in the State of Idaho and I have gone over the proposals very carefully and at this time will list for you our assessment of the proposed program.

1. Generally speaking this is a good bill. However, it is possible under the bill for an Indian to dispose of his lands on which there are heirship problems. This could be done by the action of one Indian.

2. The preferences for purchase given to the individual Indians or to the tribes is good. This makes it possible for the government of the tribe to retain Indian lands which are within the reservation areas. However, the objection by an heir to what is considered a nonfair price, which would cause the land to be sold at public auction can be very troublesome. Five dollars and two drinks of whisky can lead to objections and provide the opportunity for any unscrupulous persons to secure Indian lands within the reservation areas and thus further complicate the problems which now exist in our "open" reservation areas.

3. The loan provisions under the bill are good. The provision for giving fee title on lands of capable Indians is good, as are the requirements for advertisement and for education programs concerning the sale of land.

4. The problems of heirship and Indian land was created by Congress and/or the Bureau of Indian Affairs through their insistence that all members of an Indian family are heirs to land owned by parents upon the death of the parents. If this provision is not corrected the heirships problems will continue. It seems there would be some way of providing for permitting the parents to determine who the heir of his land should be rather than having all members of the family participating in the total land area as heirs. Possibly this would take another bill or other action by Congress.

These remarks are not particularly criticisms of the bill, but rather, are our interpretation of what will happen if the bill is passed.

We are most interested and happy to receive committee reports from you as we often have to explain and interpret to various individuals on our reservations.

If we can be of assistance to you in any way please call on us.

Yours very truly,

D. F. ENGELKING,
Superintendent of Public Instruction.
HAROLD T. FARLEY,
Director, State-Federal Programs.

IDAHO FALLS, IDAHO, *May 31, 1961.*FRANK CHURCH,
Senator, Washington, D.C.

DEAR SENATOR: Thanks for remembering my opposition to anti-Indian legislation and your information sent to me. It is surely a sad situation when we are always taking advantage of the real Americans—the Indians.

At the same time we are today being asked by the Secretary of State, Rusk, to inflate our Nation with another huge appropriation for foreign aid—already greatly overdone. We buy foreign friends and don't have them any longer than the relief money lasts.

Let's stop robbing the Indians, as of now, by killing the Indian heirship bill S. 1392.

Your help in this crucial issue will be greatly appreciated. Enclosed find brief breakdown of this unfair bill.

With personal regards,

C. S. ODEN.

INDIAN HEIRSHIP LAND BILL, S. 1392

1. The heirship land problem has long existed. It has now rendered 473,437 acres of land unusable by Indians. Over 3½ million acres of it is now used by non-Indians (because Indian use is tied up for lack of credit, and it is more simple for agency people to deal with big operators of the land).

2. The heirship land management is a burden to the Federal Government and requires a great number of employees to distribute income among the heirs, etc. (If the tribes had been permitted revolving loan credit to buy it up, the problem could have been greatly reduced in the past 10 years.)

3. The bill seeks a solution in the sale of the land to non-Indians and Indians (wherein the tribe is put at a disadvantage in cumbersome machinery to get approval of the purchase plan from the Government).

4. In case of the supervised sale by the Government does not get realistic bids, there can be an auction (it is easy to see the disadvantage of the Indian heir or the tribe that wants to buy).

5. Any one heir can force the sale of the land. (This might be putting an undue pressure on the competent fellow heirs or the tribe to buy the land.)

6. The tribe can be permitted to mortgage or sell tribal land in order to get money to buy up the heirships. (It is easy to foresee the local banks cashing in on this procedure.)

7. The tribes must first try to get loan funds from local banks before applying to their customary Indian revolving loan fund. (This is the road to bankruptcy in short order so that not only would the heirships be lost to whites through the supervised sales, but the revolving loan machinery would be a trap to lose other trust tribal lands.)

8. The tribes would have to assume full cost of management of the heirship lands that they would buy, thus the lands would be in terminated status, and probably taxable. After the risks and sacrifices of the loan program, the road to further losses of the heirships is in sight.

SUMMARY

This bill provides for the expeditious disposal of up to 12 million acres of Indian lands, and a quick termination of the Federal trusteeship over the rest of the Indians' property since it specifically provides for breaking the trust after 1964.

It is trying to bribe the tribes by incorporating the revolving loan fund for which they have been pleading since it was effectively closed to them in 1953-54.

TULALIP BOARD OF DIRECTORS,
Marysville, Wash., April 7, 1961.

Senator HENRY M. JACKSON,
Senate Office Building, Washington, D.C.

DEAR SENATOR JACKSON: There has recently been introduced into the Senate a bill sponsored by Senator Church, of Idaho. The bill (S. 1392) purports to solve the problem of Indian heirship lands, which are, as you are doubtless aware, in a sad state of affairs.

While the bill may have some redeeming points it also includes some provisions that are entirely unacceptable to us. In fact the advancement of our people would be hampered or altogether stopped if such a bill were enacted. I refer to the sections that would place Indian land in fee. This would simply give non-Indians an opportunity to secure these lands at the expense of the Indian.

We are completely opposed to this bill and earnestly request that you will agree with our contention and make every possible effort to see that this bill is not passed.

Please keep us informed of your progress.

Sincerely yours,

THE TULALIP TRIBES,
WAYNE W. WILLIAMS,
Assistant Business Manager.

UNIVERSITY OF MAINE,
Orono, Maine, April 13, 1961.

Mrs. MARGARET CHASE SMITH,
U.S. Senate, Washington, D.C.

DEAR SENATOR SMITH: In accordance with the resolution passed by the Indians of the Northeastern States at the eastern regional meeting of the American Indian Chicago Conference, held at Haverford College, Pennsylvania, on April 8 and 9, I am writing to ask you to do what you can to table Senate bill 1392. It was brought to our attention at the meeting that this bill would adversely legislate against our western brothers in the matter of land transfers. We of the eastern tribes feel that it would be unfair to pass this bill, and ask that the Senate wait at least until after the American Indian Chicago Conference (June 13 to 20) before considering the bill. We feel that this conference will be the voice of the American Indian, and that its resolves should be heard by all members of the Congress. Your help in laying this bill on the table will be appreciated by all Indians, who are standing together now, more than ever.

Respectfully yours,

RICHARD BOUNDING ELK, *Wabanaki.*

PENOBSCOT INDIAN NATION,
OFFICE OF THE CHIEF AND COUNCIL,
Indian Island, April 15, 1961.

Senator MARGARET CHASE SMITH,
U.S. Senate, Washington, D.C.

DEAR SENATOR SMITH: Being that you are one of our Maine Representatives to the U.S. Congress, we would like to kindly ask you to do all in your power to table Senate bill 1392 at least until after the American Indian Chicago Conference (June 13-20).

This favor for us would enable the Indian Nations of the States to discuss this harsh, unhuman action taken against them. Thank you very much for your cooperation.

Respectfully yours,

ALBERT J. NICOLA,
Governor of Penobscot Nation.

MONTANA FARMERS UNION,
Great Falls, Mont., April 21, 1961.

Senator FRANK CHURCH,
Senator Office Building, Washington, D.C.

DEAR SENATOR CHURCH: I have been informed a section of S. 1392, recently introduced in Congress, would allow use of Indian tribal lands as security in land sales. If this is true I would respectfully recommend revision or elimination of that section since it would appear to jeopardize Indian equity in reservation property. Will you kindly send me a copy of the bill?

Thank you.

LEONARD KENFIELD, *President.*

PUEBLO OF ISLETA,
Isleta, N. Mex., August 1, 1961.

SUBCOMMITTEE ON INDIAN AFFAIRS,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Senate Office Building, Washington, D.C.

GENTLEMEN: We have just learned from our very good friend Senator Chavez that you will hold hearings on August 9 on legislation trying to solve the Indian heirship problem and that if we wished we could testify.

The Pueblo of Isleta is not handicapped by the heirship problem because in the past we had good friends, like Senator Chavez, Senator Anderson, Judge Hanna, Senator Bratton, and Francis Wilson, who fought our battles and prevented our land from being allotted.

Nevertheless, we know what a terrible thing it is for Indians to break up their reservations into little lots, which cannot be used. What good is 160 acres of grazing land? Anybody with horsesense knows you cannot use it. But the Government still made the Indians break up their own land into those little pieces. Now the Government is paying the penalty by having to keep books and pay clerks and do a lot of useless work. Since the Government itself caused this bad situation, the Government ought to bring the Indians as near back to where they were, as far as their land holdings go. We know that if honest men bought allotments, they should not be bothered. But where the Indian land can be consolidated and put back into tribal ownership, if the tribe can use the land for a good purpose, that ought to be done. The bill that does that best is the one that we recommend you adopt.

We are not experts in this kind of thing, but bill S. 1392 would open the door for selling more Indian land, instead of riveting it into Indian ownership. The same is true of H.R. 6569. The Secretary of the Interior, Mr. Udall, has made recommendations which we understand are in H.R. 8077. If we have any say on it, that is the bill we think should be passed, as it gives the Indians a better break in trying to keep the land in Indian ownership and letting them make a living off it. Indians who have land can hold their heads high, but an Indian without land is like a little bird without a nest.

I am writing this to you by direction of my council.

Very truly yours,

ESQUIPALA JOJOLA, Governor.

DELLWO, RUDOLF & GRANT,
Spokane, Wash., August 22, 1961.

Re S. 1392, Indian heirship.

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
U.S. Senate, Washington, D.C.
(Attention of Clinton Anderson).

GENTLEMEN: Despite the opposition by the Indian Bureau and the Indian task force, I understand that S. 1392 is being seriously considered by your committee.

There are enclosed copies of a resolution passed by the Coeur d'Alene Tribe of Indians, which I represent, condemning this bill. I have already sent miscellaneous other material to Senator Church. I also represent the Spokane Tribe of Indians and have been quite active in other Indian organizations. I know of no Indian organizations in the northwestern area supporting this bill and know that most of them are vigorously opposing it.

I could write pages setting forth the various arguments against it, but I want to mention only (as I did to Senator Church in an earlier letter) that this bill, its philosophy and spirit, is completely contradictory to the public statements made by President Kennedy, Secretary Udall, and Under Secretary Carver regarding similar problems and the administration's view toward termination of trust relationship. This bill is considered a betrayal by knowledgeable Indians.

Respectfully yours,

ROBERT D. DELLWO.

COEUR D'ALENE RESOLUTIONS No. 181 (61)

Whereas Senate bill 1392, introduced by Senator Frank Church, of Idaho, purports to be a bill to assist in solving the problem growing out of fractionated heirships; and

Whereas there are many good features in the bill but it goes far beyond heirship problems; and

Whereas particularly in section 10 of said bill, it is in effect a termination bill; and

Whereas section 10 of said bill has implications and ramifications far beyond heirship problems and, in fact, provides for the termination of the trust status of individual restricted Indian lands except in individual instances of incompetency, and said section is completely unnecessary to the balance of the bill; and

Whereas this legislation follows the too common pattern of including in meritorious legislation matters of even greater importance not directly relating to the primary purpose of the legislation and resulting in effects far beyond that necessary to achieve the basic purpose of the legislation; and

Whereas it is basically unfair to include an extreme termination matter in a fractionated inheritance bill and such legislation should, if proposed, be at least separately presented so that a matter as important as termination of trust status of individually held restricted lands can be considered and debated on its merits and not in conjunction with something else: Now, therefore, be it

Resolved, That the Coeur d'Alene Tribal Council go on record as opposing Senate bill 1392, urging its defeat in toto as being deceptively presented as a bill to correct heirship problems when in fact it is a termination bill; be it further

Resolved, That the Department of Interior, the Senate and House Committees on Indian Affairs, and the interested Senators and Congressmen, such as Senator Church, of Idaho, be advised that the Coeur d'Alene Tribe resents the presentation of such dual-purpose legislation in which a serious termination proposal is concealed as a last paragraph of an heirship bill and is presented in words and form as merely for the purpose of solving heirship problems, and, in deference to the rights of Indians and their tribes to have such serious legislation honestly proposed without deception, that section 10 of said bill be deleted so that tribes and their spokesmen can honestly and objectively investigate the legislation as affecting fractionated heirships only; be it further

Resolved, That the Coeur d'Alene Tribal Council go on record as militantly opposing any proposal which seeks to terminate the trust status of Indian lands.

PUEBLO DE SAN ILDEFONSO,
Santa Fe, N. Mex.

SUBCOMMITTEE ON INDIAN AFFAIRS,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Senate Office Building, Washington, D.C.

GENTLEMEN: We have just learned from our very good friend, Senator Chavez, that you will hold hearings on August 9 on legislation trying to solve the Indian heirship problem and that if we wished we could testify.

The Pueblo de San Ildefonso is not handicapped by the heirship problem because in the past we had good friends, like Senator Chavez, Senator Anderson, Judge Hanna, Senator Bratton, and Francis Wilson, who fought our battles and prevented our land from being allotted.

Nevertheless, we know what a terrible thing it is for Indians to break up their reservations into little lots, which cannot be used. What good is 160 acres of grazing land? Anybody with horsesense knows you cannot use it. But the Government still made the Indians break up their own land into those little pieces. Now the Government is paying the penalty by having to keep books and pay clerks and do a lot of useless work. Since the Government itself caused this bad situation, the Government ought to bring the Indians as near back to where they were, as far as their land holdings go. We know that if honest men bought allotments, they should not be bothered. But where the Indian land can be consolidated and put back into tribal ownership, if the tribe can use the land for a good purpose, that ought to be done. The bill that does that best is the one that we recommend you adopt.

We are not experts in this kind of thing, but bill S. 1392 would open the door for selling more Indian land, instead of riveting it into Indian ownership. The same is true of H.R. 6569. The Secretary of the Interior, Mr. Udall, has made recommendations which we understand are in H.R. 8077. If we have any say on it, that is the bill we think should be passed, as it gives the Indians a better break in trying to keep the land in Indian ownership and letting them make a living off it. Indians who have land can hold their heads high, but an Indian without land is like a little bird without a nest.

I am writing this to you by direction of my council.

Very truly yours,

JOE A. AGUILAR, *Governor.*

PLUMMER, IDAHO, August 17, 1961.

HON. FRANK CHURCH,
U.S. Senate Office Building, Washington D.C.:

Coeur d'Alene Tribal Council unalterably opposed to Senate bill 1392 mainly because of termination and referendum provisions and favors substitute bill presented by Interior Department. Coeur d'Alene Tribal Council likewise opposed Senate bill 2188. Pertinent resolutions in each case follow.

JOSEPH R. GARRY.

BILLINGS, MONT., August 17, 1961.

Senator FRANK CHURCH,
Chairman, Senate Subcommittee on Indian Affairs,
Senate Office Building, Washington, D.C.:

Many Indians and whites in Montana strongly oppose favorable action on S. 1392. This bill refutes the stated policy and promises made by the Kennedy administration as well as the recommendation of Secretary Udall's task force. It refutes the hopes and desires of Montana's tribes. This bill will be fought vigorously by all in Montana concerned with Indian affairs.

Mrs. WILSON CLARK.

WASHINGTON, D.C., August 17, 1961.

Re S. 1392 and related proposed legislation concerning fractional heirship of Indian land.

HON. FRANK CHURCH,
U.S. Senator,
Senate Office Building, Washington, D.C.

DEAR SENATOR CHURCH: Pursuant to the permission granted at the hearing on August 10, 1961, before the Subcommittee on Indian Affairs, I transmit herewith for inclusion in the record my statement, a copy of my brief before the Secretary of the Interior in the *Running Horse* case and a copy of the complaint in that case in the U.S. District Court for the District of Columbia seeking judicial review of the Secretary's decision that he has power to charge trust land with claims for old-age assistance and welfare.

Old-age assistance and welfare claims.—In my testimony I explained that welfare and old-age assistance claims by State welfare departments are a major cause of the so-called unproductive land. When an Indian dies and the State files a claim, the Secretary allows the claim as a charge against the land. If the land is leased the rent is collected by the Bureau of Indian Affairs and paid to the State. If the land is sold the proceeds are collected by the Bureau and applied first to pay the welfare claim. The Bureau acts as the collection agency for State welfare departments.

It seems fairly obvious that Indian heirs holding 160 acres of grazing land are not interested in leasing, where the lease money which runs from \$80 to \$130 per year is paid to the State and it would take 20 or 30 years to pay off the claim. The Indian heirs are not interested in selling where the purchase price would go to extinguish the welfare claim. Neither S. 1392 nor the Department's bill give any consideration to this situation. Both would permit involuntary sale and the heirs would lose their land and get no money. The chairman properly pointed out that this may be a problem for separate legislation. This is true of the overall problem, but the matter is immediately relevant to involuntary sales under S. 1392 or similar proposed legislation. This same problem was solved by special language in Public Laws 85-915, 85-916, and 85-923 as amended by Public Laws 86-543, 85-544, and 85-545, respectively, to protect compensation for land involuntarily taken for Oahe and Fort Randall Dams. Following the pattern of those laws, I suggest for the committee's consideration the language incorporated in section 8 of the annexed draft of bill reading as follows:

"No part of the proceeds from the sale of any trust or restricted land under the provisions of this Act, shall be subject to any lien, debt, or claim of any nature whatsoever against the individual Indian landowners or their Indian predecessors in title, except where the land is security for the payment under an instrument duly authorized by the Secretary of the Interior, and except for delinquent debts owed to the United States or to the tribe by the individual

Indian owners, and the Secretary of the Interior determines and certifies that no hardship will result from the payment of such delinquent debts."

Language empowering Secretary to represent Indians under legal disability, etc.—During my testimony I was asked to submit language empowering the Secretary to represent Indians under legal disability and Indians whose whereabouts were unknown. Such language, incorporated as section 7 of the annexed draft of bill, reads as follows:

"For the purposes of this Act, and for the purposes of voluntary or negotiated sale of any interest in trust or restricted land, the Secretary of the Interior is authorized to represent any Indian owner or claimant who is a minor or who is under any other legal disability, and the Secretary, after first giving reasonable notice by publication, is authorized to represent any Indian owner or claimant who cannot be located after reasonable and diligent search."

Judicial partition.—The Department's suggested section 6 for judicial partition covers the situation where some of the interests in the land are held in trust and some in fee. If consideration is to be given to this section, I suggest the incorporation of language to protect the trust interests. This could be accomplished by substituting section 6 on judicial partition in the draft of bill accompanying this letter.

Our proposed section 6 on judicial partition will also apply where some of the interests in land were held in trust and some in fee. If the fee owners refused to grant a power of attorney to the Secretary to permit negotiated sale or administrative partition, then our section would go into operation upon the application of the owner of any interest in the land. The Secretary's version of judicial partition confines initiation of the proceedings to owners of fee interests.

It seems to us that in most instances powers of attorney would be forthcoming because administrative partition would be much cheaper—no court costs, attorneys fees, or appraisal fees. The legislation should be framed to encourage this by giving no special advantage to judicial partition. Under the Secretary's version the advantage now is with judicial partition since no preferential right of purchase is preserved for the tribe or Indians and there is no protection of the trust interests once partition proceedings commence.

Under our proposed judicial partition section, the United States would be an indispensable party to judicial partition with the right of removal to the U.S. district court for the district in which the land is located following the procedure prescribed in title 28, United States Code, section 1446. The Secretary of the Interior would have a preference right, in his discretion, to purchase the land for or in behalf of any Indian or Indians or the tribe on whose reservation the land is located at a fair valuation to be fixed by appraisement, or if offered for sale by competitive bid or auction to meet the highest bid. In case of a judicial sale or partition, the conveyance would operate to remove the trust, provided that with the consent of the Secretary the land may be taken by an Indian or tribal purchaser in trust.

Under the Department's version of judicial partition, the United States washes its hands of any responsibility for the trust interest once the Secretary consents to partition at the instance of an owner of an undivided interest. This is wholly inconsistent with the Federal responsibility as pointed out by the Supreme Court in *United States v. Hellard* (322 U.S. 362 (1944)), where the Court stated (p. 366):

"Restricted Indian land is property in which the United States has an interest. * * * The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. * * * The United States as guardian of the Indians is necessarily interested either in obtaining partition in kind where that course conforms to its policy of preserving restricted land for the Indians or in seeing that the best possible price is obtained where a sale is desirable. * * *"

Other suggested language.—There are other items covered by language in the proposed bill accompanying this letter for the committee's consideration. Attention is directed to section 5 of the draft covering administrative partition at the instance of 25 percent interests in the land (10 or more owners), or 50 percent interests (less than 10 owners), or the tribe, if it has any interest.

Particular attention is also directed to section 3 of the draft. The object of this section is to vest broad powers in the Secretary designed to encourage the sale of trust or restricted land to the tribe on a voluntary basis, with payment in cash, or on a deferred payment plan, or in certificates, or a combina-

tion of the same as conditions dictate. The tribal certificates of indebtedness could be used to pay debts to the tribe and rental for the use of tribal land and would be redeemable from an established sinking fund. The details would fall under the plan to be worked out by the tribe and the Secretary. Constitutional questions are avoided because the seller's consent is required. The section would permit an Indian to sell his separate fractional interests in six or seven different tracts, for certificates. In return the Indian would be allocated the use of a single tract of tribal land and his certificates could be used to pay for the use of such land. The draft bill provides for the reservation of life estates as a homestead, in all or part of a tract. Aggressively administered, the provisions of the draft would make heavy inroads on the heirship problem and over a period of time would eliminate it.

I am sure the committee will understand that the proposed bill provides no panacea. No bill can do that. But I believe it opens the way for a serious attack on the problem and most important would meet with general acceptance by the tribes and their people. I fear the removal-of-trust solution will stimulate great resistance by the tribes and their people as well as their friends, and such a solution, of course, is inconsistent with the announced policy of the administration and the platforms of both parties.

I appreciate this opportunity to submit my views.

Kind personal regards.

Sincerely,

MARVIN J. SONOSKY.

DRAFT OF BILL PREPARED BY MARVIN J. SONOSKY RELATING TO THE INDIAN HEIRSHIP PROBLEM

DEFINITIONS

SECTION 1. As used in this Act, the following definitions shall govern:

(a) "Secretary" shall mean the Secretary of the Interior or his authorized delegate.

(b) "Fractionation" shall mean the results of the process by which the beneficial interest in Indian trust lands and restricted lands has been divided among numerous owners.

(c) "Trust lands" shall mean any real property in which any interest is held by the United States in trust for the use and benefit of an Indian or Indian tribe.

(d) "Restricted lands" shall mean any real property in which any interest is vested in an individual Indian or Indian tribe subject to a restriction against alienation without the approval of the Secretary.

(e) "Indian tribe" or "tribe" shall include any recognized tribe, band, group, community, or pueblo of Indians.

POLICY

SEC. 2. It is hereby declared to be the public policy of the United States that Indian trust lands and Indian restricted lands shall be used productively for support and advancement of the trust beneficiaries. The Congress finds that the historical system of allotments to individual tribal members constitutes an impediment to full productivity and effective management when fractionation of ownership interests has occurred through descent and distribution to multiple heirs. It is the purpose of this Act to promote the consolidation of such interests through acquisition and management by the tribes of the beneficial interests held by individual Indians. The Secretary of the Interior is authorized and directed to take such action and to devise such plans or programs under the provisions of this Act as will give effect to the policy expressed herein.

PLANS FOR ACQUISITION BY THE TRIBES OF INTERESTS IN TRUST AND RESTRICTED LAND

SEC. 3. Under plans approved by the Secretary of the Interior and an Indian tribe, interests in trust or restricted land, on or adjacent to the reservation, may be sold and conveyed to the tribe occupying the reservation for not less than fair market value of the interests acquired, on such terms and conditions as may be prescribed in the approved plan. Title to land acquired under the plan shall be taken by the United States in trust for the tribe. Such land may be mortgaged or encumbered by the tribe with the consent of the Secretary. For the purpose of any foreclosure or sale proceeding, title to the land shall be regarded as vested in the tribe, in fee simple, the United States shall not be a necessary

party to such proceeding, and any conveyance pursuant to such proceeding shall divest the United States of title to the land.

Any plan approved by the Secretary and the tribe shall include, without intending any limitation hereby, the following:

(a) Provision for payment of the consideration for the land in cash, on a deferred-payment plan or by unsecured tribal certificates of indebtedness bearing interest on the principal sum at not to exceed 4 per centum per annum, or any combination thereof;

(b) Provision for the purchase of interests in land subject to a right of homestead for a term of years or for life of all or a portion of the acquired land, where in the judgment of the Secretary such action is appropriate to provide a home for the Indian owner or owners;

(c) Provision requiring that the land be leased or used in tribal enterprises and that the full fair market rental value of the land be paid by the lessee or the tribe into a reserve fund for the redemption of tribal certificates of indebtedness;

(d) Provision making tribal certificates of indebtedness alienable among members of the tribe with the consent of the Secretary and permitting such certificates to be used by members of the tribe, where practicable, in lieu of cash to pay rentals or other debts owing to the tribe or for the purchase of the right to use and occupy tribal lands by a member of the tribe for a specified term of years or for life;

(e) Provision to encourage members of the tribe to devise trust land or restricted property by wills approved by the Secretary.

CONSERVATION OF ASSETS

SEC. 4. Whenever the Secretary determines that fractionation of ownership interests is preventing the effective use of any trust or restricted lands for which he would otherwise be authorized by law to execute or approve a contract or lease for the trust or restricted interests, he is hereby authorized, in his discretion and without the request or consent of owners, (a) to execute a lease for the use of such lands, (b) to execute a contract for the sale of any of the timber on such lands, or (c) to grant a right-of-way or easement over such lands, such action to be binding upon the owners of both restricted and unrestricted interests.

ADMINISTRATIVE PARTITION

SEC. 5. The Secretary of the Interior is authorized to partition or sell (a) land in which interests are held in trust or restricted status, and (b) land in which some interests are held in trust or restricted status and the Secretary is authorized by power of attorney to sell and convey all interests not in trust or restricted status, (1) upon the request of the owners of not less than a 25 per centum interest in the land where ten or more persons own or claim interests, or (2) upon the request of the owners of not less than a 50 per centum interest in such land where fewer than ten persons own or claim interests in such land, or (3) upon the request of the tribe where it has any interest in such land. Any partition or sales shall be subject to the following conditions:

(a) The Secretary shall have determined that such action is in the best interest of the Indian owners and the tribe, where the land is located on or adjacent to its reservation, and is not detrimental to the local Indian community.

(b) A sale shall be on the basis of competitive bids, except that prior to such a sale the tribe shall have the preferred right to purchase any lands which are located within the boundaries of or immediately adjacent to its reservation at the fair market value as appraised by the Secretary. At a competitive sale the tribe shall have a preferred right to meet the high bid for any such lands. If the tribe does not exercise its preference right to meet the high bid, any Indian owner of an interest in such lands shall have a preferred right to meet the high bid. If more than one Indian owner exercises such a preferred right, the land shall be sold at auction limited to the Indian owners asserting the preferred right. The highest competitive bid shall be considered the opening auction bid. No sale shall be made for less than a sum substantially equal to the fair market value as appraised by the Secretary.

(c) Title acquired by a tribe pursuant to this section shall be taken by the United States in trust unless the land is outside the reservation or approved tribal consolidation area. Title acquired by an Indian shall be taken in trust or restricted status (1) if the Indian already owns a trust or restricted interest

in such lands, or (2) if the Secretary determines that the Indian lacks ability, knowledge, experience, and judgment to manage his business affairs with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing his property or the benefits thereof. Such lands shall not be taxable.

(d) The proceeds of any sale shall be distributed to the owners under the terms and conditions of any law otherwise applicable to such distribution, subject to the provisions of section 8.

JUDICIAL PARTITION

SEC. 6. When the Secretary of the Interior, after due effort, is unable to obtain powers of attorney to sell and convey all unrestricted interests in trust or restricted land, the Secretary, upon the request of any owner of an undivided interest in such land, shall consent to judicial partition of the lands if in his judgment such action will be in the best interests of the Indian owners as a whole and the tribe on whose reservation the land is located or adjoins, and will not be detrimental to the Indian community. Where consent is granted jurisdiction over the land is hereby conferred on any State court of competent jurisdiction to hear and determine the partition proceedings and to render judgment for partition in kind or judicial sale in accordance with the law of the State wherein the lands are situated. The United States shall be an indispensable party to any such proceeding with the right of removal of the cause to the United States district court for the district in which the land is located, following the procedure in title 28, United States Code, section 1446. The Secretary of the Interior shall have a preference right to purchase the land at partition sale for the tribe on whose reservation the land is located or adjoins or for an Indian or Indians at a fair valuation to be fixed by appraisal or if offered for sale by competitive bid or auction, to meet the highest bid: *Provided*, That any title acquired in the proceedings for a tribe shall be taken in trust for the tribe unless the land is outside the reservation or approved tribal consolidation area of the tribal purchaser and if acquired for an Indian shall be taken in trust or restricted status unless the Secretary determines that the Indian satisfies the competency test provided for in section 5(c).

REPRESENTATION

SEC. 7. For the purposes of this Act, and for the purposes of voluntary or negotiated sale of any interest in trust or restricted land, the Secretary of the Interior is authorized to represent any Indian owner or claimant who is a minor or who is under any other legal disability, and the Secretary, after first giving reasonable notice by publication, is authorized to represent any Indian owner or claimant who cannot be located after reasonable and diligent search.

DEBTS

SEC. 8. No part of the proceeds from the sale of any trust land under the provisions of this Act, shall be subject to any lien, debt, or claim of any nature whatsoever against the individual Indian landowners or their Indian predecessors in title, except where the land is security for the payment under an instrument duly approved by the Secretary of the Interior or his authorized delegate, and except for delinquent debts owed to the United States or the tribe by the individual Indian owners, and the Secretary of the Interior determines and certifies that no hardship will result from the payment of such delinquent debts.

LOANS TO THE TRIBES

SEC. 9. For the purposes of purchasing land and redeeming tribal certificates of indebtedness issued under this Act, the Secretary is authorized to make loans to tribes under such terms and conditions as he may prescribe: *Provided*, That no land located on or adjacent to an Indian reservation which the tribe of that reservation desires to acquire, shall be offered for sale for cash under section 3 or under sections 5 and 6 of this Act, unless the tribe has funds available for the acquisition of such land.

All funds that are now or hereafter a part of the revolving fund authorized by the Act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1968), and the Act of April 19, 1950 (64 Stat. 44), as amended and supplemented, including sums received in settlement of debts of livestock pursuant to

the Act of May 24, 1950 (64 Stat. 190), sums collected in repayment of loans heretofore or hereafter made, and sums collected as interest or other charges on loans made, shall hereafter be available for loans for purposes of this Act.

The appropriation authorization in section 10 of the Act of June 18, 1934 (48 Stat. 986), is hereby amended by increasing it from \$10,000,000 to \$50,000,000.

NOTICE

SEC. 10. The Secretary shall give actual or constructive notice of any action proposed to be taken under sections 4 and 5 of this Act, with the right of protest and appeal under procedures prescribed by the Secretary.

EXECUTION OF TITLE DOCUMENTS

SEC. 11. The Secretary is authorized to execute such patents, deeds, assignments, releases, certificates, orders, leases, contracts, or other instruments as may be necessary or appropriate to carry on the purposes of this Act.

REGULATIONS

SEC. 12. The Secretary is authorized to issue such regulations as are necessary to carry out the purposes of this Act.

SEC. 13. This Act shall not repeal any authority of the Secretary under other law, but it shall supersede any limitation on the authority of the Secretary that is inconsistent with this Act.

STATEMENT OF MARVIN J. SONOSKY, WASHINGTON, D.C., ATTORNEY FOR VARIOUS INDIAN TRIBES, ON S. 1392 AND RELATED PROPOSED LEGISLATION

Mr. Chairman and members of the committee, please accept my thanks and the thanks and appreciation of the Indian tribes I represent as general counsel. These tribes are located in the States of North and South Dakota, Montana, and Wyoming and include the Standing Rock Sioux Tribe from the State of North Dakota, so ably represented on this subcommittee by Senator Quentin Burdick.

It is my understanding, confirmed by the statement of the chairman made yesterday, that S. 1392 was intended as a vehicle for gathering the views of all concerned in order to develop final legislation. I have so advised the tribes I represent and have suggested to them that their final determination of support or opposition should be withheld until we have an opportunity to examine the product of these hearings. At the outset, may I say that the tribes I represent favor the principle of remedial legislation. At this time, however, we are not prepared to wholly support either S. 1392 or the administration's proposed bill introduced in the House as H.R. 8077. I should like to outline, however, the broad views of the tribes.

The tremendous volume of evidence gathered by the outstanding staff of this committee leaves no room for argument but that there is need for remedial legislation to clean up in part, at least, what the chairman yesterday referred to as a "mess." The tribes are somewhat worried, however, that the impatience of the committee over the conditions it has found will move it to concentrate on the cure, and recommend legislation which will solve the problem at the expense of the people it is designed to aid. In other words, we are concerned that your medicine will be too strong and will result in damage, now unforeseen and unintended.

The heirship problem was created by Congress when it directed the Secretary to convert tribal land into individual allotments with restraints against alienation. As the land passed by inheritance the number of owners increased and their individual interests in the same tract of land became smaller. The process is a continuing one. The results have been most satisfactory to the United States, to most individual Indian owners of fractional interests, and to the tribes.

The Government is disturbed by the situation it has created. It is confronted with the administrative need for maintaining separate records and accounts for each fractional interest of each heir, with the attendant army of personnel and equipment. The cost is highly disproportionate to the values involved.

The General Accounting Office has already indicated its views in this respect. In addition the Department of the Interior is frustrated in its efforts to carry out its trust obligation to put the land into productive use because of the asserted need for consent from the multiple heirs in carrying out management functions.

The individual Indian owner of a fractional interest is generally dissatisfied unless his interest brings in a meaningful annual income, or unless he is the heir in possession and is using all the land without charge.

I was delighted to hear expressions yesterday indicating recognition of a trust responsibility not only to the individual Indians but also to the tribes.

The tribes desire to bring to the committee's attention the need for safeguards and protective features to cover matters which are of serious concern to the tribes. We list some of them as follows:

1. The tribes are concerned that remedial legislation should not destroy the reservation land base. In the "open" reservations of North Dakota, South Dakota, and Montana, the individual trust land forms a part of the overall reservation land base. Such land is incorporated into grazing units embracing both individual and tribal trust land. Removal of key tracts of individual trust land could destroy the value of hundreds of acres of other individual trust and tribal land within the same unit.

On the strength of commitments made by the United States the tribes have borrowed large sums from the Government and have used large amounts of their own funds in land purchase programs. They do not want the way left open for their landholdings to be broken by sale to outsiders. They do not want to face the prospect of competing with non-Indian ranchers who are avidly anxious for a procedure which will let them break the tribal holdings. The tribes wish to be certain that protective features are included in the legislation which will prevent this from happening.

2. The tribes are concerned for those Indian families who are living on heirship lands and who know no other home. These lands could be involuntarily sold under S. 1392 or Interior's bill.

3. The tribes are concerned that Indian communities should not be destroyed by the sale of heirship tracts on which they are located.

4. The tribes are concerned as to what individual Indian owners will get out of this land. The tribes want to know what will be done about the old-age assistance or welfare claims that the Department, unlawfully we think, has charged against these lands, so that if the lands are sold the claims are paid and the heirs will get nothing. In our view, these welfare claims are one of the prime reasons (a) for the so-called unproductive land, and (b) for the inertia on the part of the heirs to cooperate in the lease and sale of their land. There is no incentive for heirs to lease land if the lease money, as it does under present regulations, is used to pay off the welfare claim. For example, in North Dakota if there is a welfare claim for \$4,000 and 160 acres of grazing land brings in an annual rental of \$100, it would take 40 years to pay the claim. The heirs are not interested in leasing such land. If the same land is sold it probably would bring in about \$3,000 and the full amount would be paid to the State of North Dakota. The heirs would get nothing.

5. The tribes are concerned that land prices should not be depressed. Under the bill large acreages could be offered at one time and over a continuing period of years. The effect of this would be to depress the value of land already held by the Indians and to lower the prices which the land would bring at competitive sale. The chairman suggested yesterday that he would expect that the program would be so administered as to avoid this situation. However, past experience has indicated that such is not the case. For example, all of the Standing Rock Reservation in North Dakota is in Sioux County and all of the Standing Rock Reservation in South Dakota is in Corson County. In these counties there are about 25 to 30 land transactions in a normal year. This includes land transfers and mortgages. Under the Bureau's administration in the past as many as 190 tracts have been offered for supervised sale at a single time. The Department's practice has been to offer any land an Indian wishes to sell. No regard has been given to the effect on the market. We are hopeful that the present administration would not pursue this practice. But legislation is not written for one administration and the proposed legislation offers no safeguards on this point.

With all due respect to the committee, the tribes see nothing in S. 1392 to take care of any of these things.

To solve the fractionated heirship problem, the heirs must be divested of their fractional interest. S. 1392 offers two remedies. One is designed to cure the existing situation. That is in section 1. The other is a prophylactic to prevent future recurrence of the situation. That is in section 10.

The curative feature of S. 1392 calls for involuntary sale by administrative partition at the request of any owner of an interest in trust land. Such a partition must be held unless the Secretary finds that the sale would not be in the best interest of the Indian owners. Nothing is said about the interests of the tribe. But there is a responsibility to the tribes. If the sale of an individual tract of land would adversely affect tribal land or trust lands of other owners, should not that be considered?

Section 1 of S. 1392 does not confer any special rights on the tribe except to participate in an auction of the land and, if successful, to take the land in trust if it is on the reservation. Where a tribe has its own funds this may be satisfactory. But where it does not have its own funds it must depend on obtaining a loan. Under S. 1392 such a loan would be contingent on meeting some 8 or 10 conditions set out in section 5 of S. 1392.

Some of my tribal councilmen who read the provisions of S. 1392 expressed the feeling that those provisions were designed to give the Secretary a dozen statutory reasons for not making the loan. Even a referendum is required as a condition precedent to the loan, including off-reservation people. The tribal councils are recognized for every purpose as speaking for the tribes. They are the governing bodies elected by the democratic process. They have entered into contracts with the United States on matters of greater consequence than contemplated by the loan arrangement under S. 1392. Congress has consistently recognized the governing bodies as authorized to bind the tribes for every purpose. Why should Congress now disregard them? Why should members of the tribe living away from the reservation have a voice in determining whether the tribe should make a loan? A member of the tribe living six States removed may well have lost all interest in what happens on the reservation. There is no reason to expect him to vote in favor of a loan. He can hardly wait to vote for termination so that the tribal assets can be divided and he can get his share.

If there is to be a loan program let it be under such terms and conditions as the Secretary may prescribe. Let us continue to recognize the governing bodies of tribes. S. 1392 delves too deeply into details. It handcuffs and restricts where the broadest kind of discretion is needed. The Secretary can think of enough reasons for not making a loan without help from Congress.

Even with a good loan program the tribes would like to see language in this bill prohibiting involuntary sales of any land the tribe desires to acquire, unless the tribe has funds available for the purchase, either its own or loan funds. There can be no other assurance that the land base will be preserved.

The tribes also desire language to take care of the situation where both the tribe and one or more heirs wish to purchase the land for the appraised value. In that circumstance the land should go to competitive bid. It is our fear, based on experience, that an Indian heir is often used as a dummy or strawman by a non-Indian to buy the land and turn around and sell it to the white man, the real party in interest. The tribes wish to protect their own landholdings against loss of key tracts in this fashion. This can be done by giving the tribe preference rights at every step.

I turn now to the prophylactic feature of the bill—section 10. S. 1392 would avoid the problem of fractional heirship lands by removing the land from the scope of Federal responsibility. To accomplish this the bill features a method for terminating the trust, so that when an Indian owner dies the land would not be in the concern of the Federal Government. The bill does this by placing on the Secretary the burden of reviewing every title where the trust extends beyond January 1, 1964, and requiring him to terminate the trust unless he finds that the Indian owner meets the competency test set out in section 10(b) of the bill. If the trust expires before January 1, 1964, it may not be extended unless the Indian meets the section 10(b) competency test. Where the Indian does not satisfy the test, the length of the extension of the trust is left to the Secretary's discretion. If the "terminated" Indian is dissatisfied with the Secretary's deci-

sion he may seek review in the Federal courts. Considering the cost of proceeding in Federal courts and the values involved, this provision is of doubtful value. Indeed, if the Indian were "incompetent" he would hardly avail himself of such a remedy.

The tribes feel that all problems cannot be simultaneously solved. The question of removal of the trust ought not be intermixed with the matter of eliminating fractional interests. It is the tribes' concern that over the years such a procedure, particularly in the hands of unsympathetic administrators, would result in speedily moving the land out of trust status, and destroy the present economic land base on many of the open reservations in the Dakotas and Montana.

It is easier to criticize than to develop legislation in this field. The tribes favor remedial legislation which will insure that the trust character of the land will not be destroyed and that land within reasonable tribal consolidation areas will pass into tribal ownership. It seems to the tribes that what is needed here is a combination of remedies including a rollback to undo the error of the Government in converting tribal land into individual ownerships. Considering the savings which would result if the land were quickly returned to tribal ownership and considering that S. 1392 contemplates a loan fund of \$50 million, the tribes are of the view that their objectives can be accomplished if the remedial legislation contained the following features:

I. Voluntary sale.—Under existing law Indian owners may sell to the tribe for the appraised value. However, if an Indian owner is under a legal disability, or if the whereabouts of an Indian owner is unknown, the necessary consent for the voluntary sale cannot be obtained. As to Indians under legal disability, it is frequently impractical to have a guardian appointed since the costs of the legal proceedings exceeds the value of the fractionated interest.

Accordingly, we recommend that the proposed legislation should authorize the Secretary of the Interior to represent Indian owners under legal disability and Indian owners who cannot be located, including unknown heirs and devisees, after notice by publication following due and diligent search. This would permit the voluntary conveyance of a major number of tracts where under existing law there is no one to speak for Indians under legal disability or those whose whereabouts are unknown.

It would be my view that most of the fractionated heirship land would be sold under this section.

II. Administrative partition.—All of the proposed legislation contains provisions for administrative partition, but no provision is made for a preferential right of the tribe and any heir to meet the high bid. Appropriate language should be added for this purpose and again the Secretary should be authorized under the administrative partition procedure to represent Indian owners under legal disability and those whose whereabouts are unknown.

III. Judicial partition.—The Department of the Interior's proposed bill provides for judicial partition in a State court where any non-Indian interests are involved and the Secretary authorizes the partition. Under the Department's bill unless the partition is authorized the United States washes its hands of any responsibility for the trust. Thus, for example, if a 25 percent interest is held in fee and the Secretary authorizes partition, there is no protection whatsoever for the remaining 75 percent trust interest. We believe that language should be included to make the United States an indispensable party to any such partition proceedings with preferential right of purchase in the Secretary for the benefit of the tribes and with the right of removal to the Federal court. See *U.S. v. Hellard*, 322 U.S. 363.

IV. Acquisition by eminent domain.—Where heirship land is in an approved tribal consolidation area, the United States would acquire title for the tribe by eminent domain proceedings. This would halt the fractionating process and conclude all title and administrative problems. The land would be transferred to the tribe under a loan arrangement whereby the tribe would be obliged to repay the United States out of the income from the land. The management of the land would remain subject to the control of the Department until the loan was repaid to insure that the full market rental value was derived from the land.

V. Enlarged management powers.—Here should be included a provision prohibiting charging the trust land with any debts of the deceased in order to encourage Indian use of the land.



UNITED STATES DEPARTMENT OF THE INTERIOR

In the Matter of the Estate of James Running Horse, Deceased, RS-4676

Probate 14109-58

BRIEF FOR APPELLANTS

STATEMENT

This matter is before the Secretary on appeal from the decision and order entered January 6, 1959, by the Examiner of Inheritance denying the heirs' petition for rehearing on the Examiner's decree and order entered October 17, 1958, insofar as it allowed the claim of South Dakota for \$3,774.50 paid to the decedent during his lifetime as old-age assistance.

James Running Horse, a fullblood member of the Rosebud Sioux Tribe, died intestate on November 17, 1957, leaving his widow and four children as heirs. He died possessed of 172.07 acres of restricted Indian land held in trust by the United States. He had inherited the land from Abraham Running Horse, his brother. The Examiner of Inheritance allowed the \$3,774.50 claim of South Dakota "in full, * * * or in the amount of the cash on hand to the credit of the estate at the time of the decedent's death, plus the gross income accruing to the estate for a period of five (5) years following the death of the decedent, whichever is less." The claim was preferred over all other claims including the probate fee and a tribal claim.

The heirs timely filed a petition for rehearing insofar as the decree of October 17, 1958, allowed the claim of South Dakota. The Examiner of Inheritance denied the petition for rehearing on January 6, 1959, on the grounds that the Examiner was bound by the regulations (25 CFR 15.1, 15.23 to 15.26) and decisions of the Department (*State Social Security Claims Against Restricted Indian Estates*, 61 I.D. 37 (1952); *Estate of Josephine Iron Heart*, I.A. 377 (August 25, 1955, unreported)).

This appeal followed on March 2, 1959.

QUESTION PRESENTED

Whether the Secretary has been empowered by Congress to charge Indian trust property in the hands of Indian heirs with the debts of the Indian decedent?

ARGUMENT

I

The charge of decedent's debts against the heir's trust property violates the trust imposed by law

The General Allotment Act imposed a trust on the property, Act of February 8, 1887, c. 119, sec. 5, 24 Stat. 389, as amended, 25 U.S.C. 348. The trust was that the United States would hold the allotted land for the trust period "for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs" according to the law of the State where the land is located and that at the end of the trust period the United States would "convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the [trust period], such conveyance or contract shall be absolutely null and void." The lands were not "liable to the satisfaction of any debt contracted prior to the issuing of a final patent therefor" (25 U.S.C. 354).

This trust runs with the land. It bound the land for the trust period "whether in the hands of the allottee or of his heirs." *Bowling v. United States*, 233 U.S. 528, 534 (1913). By reason of this trust, debts incurred by an Indian during the period of trust are not enforceable against the allotment. *Mullen v. Simmons*, 234 U.S. 192, 197-199 (1914) (judgment); *United States v. Chimburg*, 224 F. 2d 177 (C.A. 9, 1955) (mechanic's lien). The land is inalienable unless the transfer is in accord with the law. *Federal Indian Law*, p. 787 et seq. The allotment and the improvements on the allotment as well as personalty issued by the United States and used on the allotment are not subject to state taxation. *United States v. Rickert*, 188 U.S. 432 (1903). The rationale of the

opinion was that if taxes were permitted "then the obligations which the government has assumed in reference to these Indians may be entirely defeated; for by the act of 1887 the government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, 'and free of all charge or encumbrance whatsoever.'" (188 U.S. at p. 438.) Income derived from the sale of trust property is not subject to federal income tax. *Squire v. Capoe-man*, 351 U.S. 1 (1956). Again the rationale was that to charge the federal income tax against the proceeds from the sale of trust property would be "inconsistent with the Government's promise to transfer the fee 'free of all charge or encumbrance whatsoever'" (351 U.S. at p. 6).

Payment of decedent's debts from trust income derived after death from the sale of the use of the land (lease) or from the sale of the land itself violates the trust. This the Secretary may not do unless authorized by Congress. We look then to the statutory authority on which the Secretary must rely.

II

The Secretary has not been empowered to charge inherited trust property with debts of a decedent

A. *There is no express statutory language which authorizes the Secretary to charge a decedent's debts against inherited trust property.* The controlling statute from which the Secretary derives his authority to determine heirs and approve wills is found in sections 1 and 2 of the Act of June 25, 1910, c. 431, 35 Stat. 855, as amended, 25 U.S.C. 372, 373. There is not one word in the 1910 Act, or any of its amendments, or in any other statute enacted before or after the 1910 Act which empowers the Secretary to make decedent's debts a charge against inherited trust property. If the power exists it must be implied. But the language of the 1910 Act, the legislative history of the Act, legislation in *paria materia* and the entire history of the policy of the United States with respect to the trust on lands allotted to Indians, compels rejection of the view that Congress by implication intended that a charge or lien be imposed against inherited trust property for debts incurred during the lifetime of the decedent.

B. *The history of the 1910 Act discloses no intent to authorize the Secretary to charge decedent's debts against inherited trust property.* Heirs to a trust allotment are determined by tribal law and custom, unless Congress provides to the contrary. See *Jones v. Meehan*, 175 U.S. 1, 31 (1899); *Federal Indian Law*, p. 810. Section 5 of the General Allotment Act provided that heirs were to be determined in accordance with State law (25 U.S.C. 348), but did not say who was to make the determination. Courts had no jurisdiction. *McKay v. Kalyton*, 204 U.S. 458, 468 (1907). The Supreme Court considered that the authority to determine the heirs of a restricted Indian was conferred on the federal courts by the Act of August 15, 1894, c. 290, sec. 1, 28 Stat. 305 (25 U.S.C. 345). *Hallowell v. Commons*, 239 U.S. 506, 508 (1916). Under the 1894 Act, the federal courts determined heirs as an incident to a title dispute to determine an Indian claimant's right to an allotment or to possession of an allotment.

The Secretary meanwhile was asserting the power to determine heirs as an incident to his duty to issue fee patents to heirs of a deceased allottee under section 5 of the General Allotment Act. He found additional authority in the appropriation acts for 1902 and 1907 and in the Act of May 8, 1906, c. 2438, 34 Stat. 182 (25 U.S.C. 349) and the Act of May 29, 1908, c. 216, 35 Stat. 444 (25 U.S.C. 404). A section in the appropriation act for 1902 authorized the sale of trust allotments by the heirs of the allottee subject to the Secretary's approval (Act of May 27, 1902, c. 888, sec. 7, 32 Stat. 245, 275; 25 U.S.C. 379). An insertion in the appropriation act for 1907 authorized any noncompetent Indian to sell his trust allotment or his inherited interest in an allotment subject to such rules and regulations as the Secretary might prescribe "and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest. * * *" (Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1018, 25 U.S.C. 405). Under these provisions the Secretary assumed the power to determine the facts of heirship as an incident to his authority to sell inherited trust land.

The Act of May 8, 1906, supra, 25 U.S.C. 349, contained a provision authorizing the Secretary to "ascertain the legal heirs" of an allottee who died prior to the expiration of the trust period and to issue a patent in fee to the heirs, or to sell the land and "pay the net proceeds to the heirs * * *." The Secretary's deter-

mination of heirs was to be "conclusive and final." This statute was superseded two years later by section 1 of the Act of May 29, 1908, *supra* (25 U.S.C. 404),¹ which also permitted the sale of allotted lands or any inherited interest in such land. It directed the Secretary to "ascertain the legal heirs" of deceased allottees but permitted fee patents to issue only if the Secretary found the heirs capable of managing their own affairs. If the heirs were not found capable, the Secretary was to sell their land with "the proceeds derived from all sales [to be] used, during the trust period, for the benefit of the allottee, or heir, * * *."

None of these statutes satisfied prospective purchasers of inherited interests who were not certain the title would be marketable without an authoritative determination that the Indian grantors were the heirs of the trust allottee. It was primarily to accommodate lending institutions and prospective purchasers that Section 1 of the 1910 Act (25 U.S.C. 372) was enacted to vest the Secretary with exclusive and conclusive authority to determine heirs. H. Rept. No. 1135, 61st Cong., 2d Sess. (1910) (Serial 5593), p. 1, quoted *infra*, p. 10; *Federal Indian Law*, pp. 77-78, 814-815. In other words, the genesis of the power to determine heirs was to establish title, not to probate estates.

C. *The language of the 1910 Act refutes the view that decedent's debts were to be charged against inherited trust property.* The background of section 1 of the 1910 Act demonstrates that its purpose was to give certainty to titles to trust land by vesting clear authority to determine heirs. There was no concern respecting creditors of Indians. No suggestion was made anywhere that the Secretary should be empowered to pay decedent's debts from trust property. It did not occur to anyone that the death of the allottee should temporarily suspend the trust which ran with the land while creditors were permitted to satisfy themselves from the trust property. The 1910 Act contains no language concerning debts because the objectives of the Act required none. There was no intention to impair or diminish the trust imposed by the 1887 Act. The Indian heirs were to receive 100 percent of the trust property.

While there is no language in the 1910 Act to support an intent that debts may be charged against trust property, there is language to support a contrary intent. Section 1 of the 1910 Act empowered the Secretary to determine heirs. It also provided for sales of inherited trust land on the deferred payment plan and for forfeiture of certain payments for default by the buyer. The statute declares "All forfeitures shall inure to the benefit of the heirs" and further specifies that "the proceeds of the sale of inherited land" should be paid to competent heirs, and as to incompetent heirs, should be "held in trust subject to use and expenditure during the trust period for such [incompetent] heirs * * *." Special attention was given to this language during the course of the debates (45 Congressional Record 5810-11 (May 4, 1910)).

This identical language calling for payment of the proceeds to the heirs was twice readopted when section 1 was amended by the Act of March 3, 1928, c. 122, 45 Stat. 161 and by the Act of April 30, 1934, c. 169, 48 Stat. 647. If Congress had intended to charge the trust interests of the heirs with debts of the decedent it would not have three times used broad language specifying "all forfeitures" were to inure to the benefit of the heirs and proceeds from the sale were to be paid to the heirs. Some notice would have been given to so radical a departure from the trust. If debts incurred during the trust period were, in effect to be made a lien on the trust property, that purpose would have been expressed.

Section 2 of the 1910 Act (25 U.S.C. 273) authorizes Indians to dispose of trust property by will approved by the Secretary. In 1914 this section was amended to provide that approval of the will and the death of the testator should not terminate the trust and to confer on the Secretary power to sell the devised land, to use the money "for the benefit of the heir or heirs entitled thereto" and "to pay the moneys to the legatee or legatees * * * or use it for their benefit." Act of February 14, 1913, c. 55, 37 Stat. 678.

This express language cannot be reconciled with the view that heirs and legatees were to receive the benefits of the proceeds of sales only after decedent's creditors were satisfied. That view would convert the power to determine heirs into authority to defeat and negate the trust. What started out as a means of assuring marketable title to insure a better price for trust land would become a vehicle for abandoning the sedulous policy of the United States to hold trust property intact for conveyance to the Indian free of all encumbrances whatso-

¹ The 1908 Act excepted Oklahoma, Minnesota, and South Dakota from its provisions but it mentioned here as a forerunner of the 1910 Act.

ever. The plain language of the statute cannot be reconciled with a construction which so violates the trust and the policy of the Government.

Other sections of the 1910 Act refute the view that decedent's debts were to be paid from the heirs' proceeds from the rent or sales of trust land. Section 4 (U.S.C. 403) authorized leases of allotments and directed that "the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit. * * *" Such language would not be employed if Congress intended the heirs receive only what was left of the lease rentals, if anything, after the decedent's creditors were through satisfying themselves. Nothing in the mandatory requirement of payment of rent to the heirs warrants the implication that a creditor was to be given first call on the rents for 5 years as held by the decree in this case.

D. *The legislative history of the 1910 Act compels rejection of the view that decedent's debts were to be paid from inherited trust property.* Under both the 1906 Act and the 1908 Act the allotment of a deceased Indian could be patented in fee to the heirs, or, sold, with the proceeds to be paid to the heirs (25 U.S.C. 349, 404). The 1908 Act (not applicable in South Dakota) distinguished between capable and incapable Indian heirs and permitted fee patents only if the Indian heir was capable of managing his own affairs, otherwise the land could be sold and the proceeds used during the trust period for the benefit of the heir.

The House Committee on Indian Affairs did not consider the bill (H.R. 24992, 61st Cong., 2d sess.) which became section 1 of the 1910 Act to make any basic change in the then existing law. The Committee represented to the House that the bill was a simple reenactment of the 1906 and 1908 Acts with changes respecting notice and hearing in determining heirs and with provision for sales on deferred payment instead of cash. The report recites (H. Rept. No. 1135, 61st Cong., 2d sess. (1910) (Serial 5593) p. 1):²

Section 1 is a reenactment of the act of May 8, 1906 (34 Stat. 182), and the act of May 29, 1908 (35 Stat., 444), authorizing the Secretary of the Interior to ascertain the legal heirs of a deceased Indian and changing existing law by specifying that the same shall be done upon notice and hearing. This section provides that the Secretary may issue patents in fee to the competent heirs of deceased Indians and where incompetent that the land shall be sold, and authorizes sales to be made under rules and regulations to be prescribed by the Secretary, contemplating that the purchase price may be paid in installments and providing for forfeiture in case of failure to comply with the terms of the sale in any respect.

This same general explanation was given on the floor of the House by the chairman of the Committee on Indian Affairs. He stated (45 Congressional Record 5811, May 4, 1910):

MR. BURKE of South Dakota. I will say that under existing law, where allotments were made prior to 1908 and an Indian has died, the administration of the estate has been assumed in some States by the courts of the State, whether they had that jurisdiction or not. A law was passed in 1908 providing that administration of Indian allotments should be under the direction and control of the Secretary of the Interior, but the States of Oklahoma, Minnesota, and South Dakota were excepted from that bill.

In 1906 there was a general act passed which applies to every part of the country except the Five Civilized Tribes, providing that where allotments were made thereafter and the allottee died, the Secretary of the Interior should have authority to determine the heirs of such deceased Indian. This bill is a reenactment of the laws of 1906 and 1908, but goes further, by authorizing the Secretary, when the heirs of a deceased Indian shall have been determined, to dispose of the land directly to the heirs, if they shall elect to take it rather than have it sold. *Under existing law, if an Indian dies, there is no way that the allotment can be disposed of except to administer the estate and sell the land, and the proceeds go to the heirs. Under this bill we provide that where the heirs are competent and capable of managing their own affairs, the land shall, if they elect, be patented to the heirs, doing away with the requirement that it shall be sold. If the heirs are incompetent, or if some are competent and some are incompetent, in that case the land must be sold.* [Emphasis supplied.]

² The report of the Senate Committee on Indian Affairs is not helpful since it deals with sections of the 1910 Act not here applicable. S. Rept. No. 868, 61st Cong., 2d sess. (June 17, 1910) (Serial 5584).

During the debate a question was raised as to how the proceeds of a sale would be held where some heirs were competent and some incompetent. The colloquy makes clear that the proceeds would be paid to the Indians. There was no mention of debts. (45 Congressional Record 5811, May 4, 1910):

Mr. Cox of Indiana. * * * Now, let me put this question: Suppose the real estate is sold under this section now under consideration, would the entire proceeds of the real estate be turned over to the competent heirs to hold it in trust for the brothers and sisters who might be incompetent?

Mr. BURKE of South Dakota. Not at all. The proviso means exactly what it says—that the proceeds shall be apportioned between the heirs as their respective interests might appear, and the portion to be credited to the competent Indian shall be paid to him, whereas the money that would belong to the incompetent Indians would be held in trust or expended for their benefit.

At the time Congress considered and passed the 1910 Act there were laws on the books which barred the payment of decedent's debts from trust income derived after his death. One provision directed that "no lands acquired under the provisions of this [General Allotment] Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent fee therefor." Act of June 2, 1906, c. 3504, 34 Stat. 325, 327, 25 U.S.C. 354.

Another provision prohibited the use of any money accruing "from any lease or sale of lands held in trust by the United States for any Indian * * * for the payment of any debt of, or claim against, such Indian * * * except with the approval and consent of the Secretary of the Interior." Act of June 21, 1906, *supra* (25 U.S.C. 410).

This explicit language would have compelled plain words in the 1910 Act if Congress had intended to make trust lands liable for debts incurred during the trust period. The Secretary is without authority to charge the land with a debt contracted prior to the issuing of the final fee patent (25 U.S.C. 354). He has no right to use money accruing from the lease of inherited land to pay the debt of another Indian (25 U.S.C. 410). That statute permits the payment of debts of the *Indian owner* with the consent of the Secretary. It does not authorize the Secretary to pay the debts of the decedent from the money derived from the lease of the lands in the hands of the heirs. Departure from those statutes and the policy they expressed is not even remotely hinted at in the legislative history of the 1910 Act.

III

The Solicitor's construction of the 1910 Act is erroneous

During the lifetime of the Indian decedent the Secretary could not sell the trust property nor take the income derived from the land to pay the Indian's debts. If South Dakota had taken a deed or mortgage from the decedent as protection against its old age assistance payments the instrument would have been void. If South Dakota had entered into a contract with the decedent to impose the old age assistance payments as a charge against the trust land or its proceeds to be collected after death, the contract would have been void. If South Dakota had reduced its claim to judgment, the judgment would not have been a lien against the land or its proceeds. It could not have been enforced against the trust property. In short, so far as creditors are concerned the trust property was not available for satisfaction of the debt during the decedent's lifetime.

This protection from alienation, encumbrance, and judicial dstraint is conferred by the trust created by law. To be sure, Congress has the power to modify the trust by subjecting trust property to the charge of debts. But, in view of the long-established policy of the United States expressed in numerous statutes designed to preserve trust property for the Indian, it would require clear and express language to support so radical a shift in policy.

The Solicitor recently had occasion twice to point this out. In 64 I.D. 127, 130 (1957) he declared:

It is well established that a clear expression of the intention of Congress is required to justify a construction of a statute which would amount to a reversal of a general policy of the Government as declared in numerous statutes. *United States v. Fisher*, 2 Cranch 358 (6 U.S.) (1805).

Again, the Solicitor stated (64 I.D. 333, 335 (1957)) :

Then too, where amendatory or supplemental legislation apparently would have the effect of reversing a general policy of the Government, a clear expression of intent is necessary. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Where a general policy is settled and of long standing, an apparently complete departure from that policy should be assumed only where it is plainly apparent that that was the intent [citing cases].

In *Ex Parte Crow Dog*, 109 U.S. 556, 27 L. Ed. 1030, 1036 (1883), on which the Solicitor relied, the Supreme Court referring to Indian statutes, stated in the penultimate paragraph of its opinion that:

To give to the clauses in the Treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the Government toward the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. *To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find.* [Emphasis supplied].

Charging decedent's debts against the inherited trust property constitutes a departure from settled policy. It would be in the teeth of the Congressional policy expressed in the General Allotment Act making any conveyance of trust property or contract "touching the same" "absolutely null and void" and guaranteeing that the land would be held "for the sole use and benefit" of the allottee and his heirs and that it would be delivered "free of all charge or incumbrance whatsoever * * *" (25 U.S.C. 348.)

If such a departure had been intended we could expect it to be stated by explicit language in the statute. There is no such language. Nor is there one word in the legislative history of the controlling legislation commencing with the General Allotment Act of 1887 which justifies such a view.

Nevertheless the Solicitor asserts that the Secretary has "implied power" to allow claims—implied from the Secretary's power to determine heirs under the 1910 Act. *State Social Security Claims—Indian Estates*, 61 I.D. 37, 39 (1952). The Secretary assumes a heavy burden indeed when he presumes to substitute implication for the "clear expression of the intention of Congress" which the *Crow Dog* case instructs is necessary.

Under the Solicitor's view in 61 I.D. 37 words must be read into section 1 of the 1910 Act explicitly authorizing the payment of an Indian decedent's debts from rents derived after death from his trust property, or from the proceeds of the sale of the property by the heirs. In short, according to the Solicitor, for all practical purposes, section 1 of the 1910 Act must be read to mean that death converts an unenforceable debt into a lien or charge on the inherited trust property and its income.

The decision reported in 61 I.D. 37 will not withstand analysis. The opinion rests on the proposition (1) that the practice of allowing claims against trust estates is one of long standing (p. 38); (2) that two solicitors of the Department each wrote a letter stating claims might be paid from funds available at death and from income accruing after death (p. 38); (3) that payment of claims was merely a matter of filling in details, "lacunae of the 1910 Act" incident to the power to determine heirs (p. 39); (4) that since creditors cannot collect their debts in the court, they would be left without a remedy if the debts were not paid at the direction of the Secretary and that to deny this aid to creditors would impute dishonesty to Congress (pp. 39-40); (5) that subsequent legislation concerning adoption (25 U.S.C. 372a) and escheat (25 U.S.C. 373a-373c) constituted recognition that the Secretary could allow claims (pp. 40-41); and (6) that the 1910 Act by implication repealed the guarantee to hold the land "for the sole use and benefit" of the heirs and deliver it "free of all charge or incumbrance" and (25 U.S.C. 348) repealed the mandate that "no lands acquired under the * * * [General Allotment Act] shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the fee patent therefore" (25 U.S.C. 354). The Solicitor goes further and holds that the policy of restraint against encumbrance and alienation specified in the General Allotment Act has been abandoned (61 I.D. pp. 41-42).

A. *The practice of allowing claims does not confer power to enforce them against inherited trust property.* Usage does not confer power. If the Secretary is without authority to collect debts from inherited trust property, the deficiency cannot be supplied by continued violation of the law. "A failure to enforce the

law does not change it." *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 759 (1931).

The opinion in 61 I.D. 37 conveys the gloss of long established practice in allowing and paying claims against trust estates. The "usage" it refers to relates to a period prior to the 1947 regulation when the practice was to use cash left by decedent to satisfy claims, generally those for last illness and funeral expenses. For example, the Solicitor (61 I.D., p. 38) referred to the case of *Grace Cox et al.*, 42 L.D. 493, 501 (1913) where, in an opinion not concerned with claims, the Commissioner of Indian Affairs, in an offhand way observed that the "estate could easily bear the expense of her [decedent's] care and maintenance during her illness" from "rentals or other funds remaining to the credit of the estate." [Emphasis supplied.] 42 L.D. at p. 501.

The 1915 and 1923 regulations made no provision whatsoever for creditor's claims. Creditors are nowhere mentioned in the regulations. The term "claimant" quoted by the Solicitor from sections 14 and 9, respectively, of the 1915 and 1923 regulations referred to persons who were claiming to be heirs. (Circular 1026, September 16, 1915; Regulations of June 19, 1923; 61 I.D. 38, 39.) This is apparent from reading the regulations as a whole.² Payment of claims of last illness and the like were made as a matter of administrative expediency from cash left by the decedent. Income accruing after distribution of the estate went to the heirs.

In 1935 regulations were issued which for the first time surrounded the determination of heirs with the accoutrements of probate procedure (Regulations, May 31, 1935, 55 I.D. 263). For the first time since the 1910 Act the regulations mention creditors and provision is made for allowance of claims "against the estates of deceased Indians" (55 L.D. p. 275). The regulations are silent as to what assets were to be subject to the claims but it is quite plain that the claims expire when the order of distribution is entered.⁴ Nothing in the Solicitor's letter of June 20, 1940, is inconsistent with this. (See 61 I.D. p. 38.) The 1935 regulations do not support the inference in 61 I.D., at page 38, that the practice of the Department was to pay decedent's debts out of inherited trust property after distribution.⁵

After passage of the Social Security Act in 1935, old-age assistance claims became a problem. Such claims are generally sizable. The cash assets ordinarily were inadequate to meet such claims, otherwise the decedent would not have been on old-age assistance. The estate usually consists of trust land only. State public welfare departments sought special treatment for their claims and received it, in the regulations promulgated June 10, 1947 (12 F.R. 3762) (25 CFR Part 81, now Part 15). Old-age assistance claims not only were given priority over general creditors, but such claims were permitted to remain in force without any time limit until collected, as contrasted to general claims which were good for only three years after their allowance, 25 CFR 15.25 (a) (b).

It is in the administration of these regulations since 1947 that the trust obligations are violated. If the Secretary had probate power he could withhold distribution of the estate to the heirs and appoint administrators who would administer the estate for the benefit of creditors. This he does not do. Once the order determining heirs is entered the estate is distributed. However, the Secretary then uses his power to protect the property from improvident lease or sale, to collect the claims.

The Secretary recognizes that the heirs are the owners of the trust land. The regulations specify that once heirs have been determined, adult heirs may negotiate leases and rents are paid to them unless otherwise provided in the lease (25 CFR 131.8). The leases are void unless signed by the heirs. (Memo. Sol. I.D., June 15, 1938, quoted at length in Felix S. Cohen, *Handbook of Federal*

² Section 14 of the 1915 regulations reads as follows:

"A written notice of the proposed hearing giving full information as to the estate, names of alleged claimants, time and place of hearing, shall be sent to each claimant or presumptive heir who lives on the reservation and served on him personally, if he can be found, and those living off the reservation by registered mail."

Public notice is usually given to creditors, not notice by personal service. Compare section 36 of the 1935 regulations, 55 I.D. 274.

⁴ Section 36 provides (55 I.D., p. 275):

"All claims against the estates of deceased Indians shall be considered exclusively probate matters until the order determining heirs or actions on the will is concluded by the Secretary of the Interior."

⁵ The Solicitor refers to sections 46, 47, 48, and 49 of the 1935 regulations (61 I.D., p. 38). According to the published version of the regulations in 55 I.D. 263, these references are in error.

Indian Law, p. 228, n. 120.) However, the approval of the Superintendent is required ostensibly to insure a fair rental to the heirs in the exercise of the trust responsibility imposed by the law. In fact the approval is used as a collection device for the State. The practice of the Bureau is to impose as a condition of approval of the lease the requirement that the rents be paid to the Indian Agency, not to the heirs. The Agency then delivers the money to the State for credit on the old-age assistance claim (e.g., Estate of Sarah Ironcloud Red Hawk, S.R. 29; Lease No. A1713B, Standing Rock Agency). This procedure violates the plain provisions of 25 U.S.C. 403 and 410.

If an heir otherwise eligible seeks a fee patent, he is denied. But that same heir will be permitted to sell his inherited land under the Secretary's supervision, on condition that the proceeds are used to pay the decedent's debt to the State (e.g., application dated May 11, 1956, by Margaret Dog Eagle, S.R. 30, to sell inherited land, Standing Rock Agency).⁶ Again, the Secretary's supervision, born from the obligation to protect the Indian's interests, is employed to collect the decedent's debt to the State. This violates 25 U.S.C. 410.

We repeat usage does not confere power. But here there has been no usage such as the Solicitor implies (61 I.D. p. 38). Prior to the 1947 regulations the "usage" was to charge the usual minor debts of decedent out of the cash he left. Certainly, no debts were charged against inherited property after distribution. Even the 1947 regulations standing alone do not justify a digerent usage. Nowhere do those regulations authorize collection or enforcement of decedent's debts either before or after the estate is distributed. But the "usage" under the 1947 regulations is something different.

What has happened is that the trust power to approve leases and authorize sales of trust land is used, not to protect the Indian owners, but as a wedge to compel heirs to pay their decedent's debts. For this purpose, it is administratively assumed, although nowhere stated, that old-age assistance claims are a lien or charge against the land until the lien is paid. Administratively, old-age assistance claims are treated as top priority first liens on the proceeds from the rent and sale of inherited trust land for as many years after distribution as may be required to collect the claims. The Department acts as the collection agency for public welfare departments of the States and makes the old-age assistance claims paramount to the interests of the heirs. In fact this process puts pressure on heirs to sell. Where lease income is small the heirs conceivably would take nothing during their lifetime. If they sell and pay their ancestor's debts there might be some balance remaining for division. The whole administrative approach violates the language, objective and spirit of the mass of federal legislation designed to protect the Indian in his trust property.

B. *The two letters written by Solicitors do not sustain present usage.* These letters do not have the dignity of memoranda let alone formal opinions. It might be noted, however, that Solicitor Margold's letter of June 20, 1940, concerned payment of a debt for \$28.82 due to the United States. The letter approved proration so that the estate was charged with only one-half the debt. It confirms a practice much different than the one administered today.

The second letter referred to in the opinion (61 I.D. p. 38, n. 2) was not available to us for examination. The file is charged to the Solicitor's office and cannot be located by the Solicitor's docket room. It cannot be determinative of any vital point.

C. *Payment of debts cannot be justified as a mere detail incident to the power to determine heirs.* This goes to the overriding question of whether the authority to pay debts may be implied. The actual administration of the asserted power demonstrates how the detail has been converted into the master, how Indian heirs are deprived of their property, and how the Department has become a collection agency for creditors—particularly public welfare departments whose claims have been favored by the regulations since 1947. Because the power to pay debts is assumed by implication it has been administratively broadened, unhampered by the restraint of statutory language and aided by loose regulations.

Nowhere do the regulations (25 CFR 15.25) in forthright language direct that claims be paid, or, state what assets may be used for payment. They do not say claims may be satisfied only from trust funds on hand at the time of

⁶ In this case the heir asked leave to sell 8 years after the testatrix's death and 4 years after distribution. Permission to sell was on condition that the Indian pay her pro rata share of the claims, but when the Agency received the money from the sale, it paid off the entire balance of the claim in violation of the condition. See the Agency records.

death or distribution of the estate. Neither do they say claims may be paid from proceeds derived after distribution from the lease of the trust land by the heirs, or, from the sale of the trust land by the heirs. Compare the explicit language of 25 CFR 15.22 providing for payment of probate fees where the regulation speaks with the assurance of the statutory authority on which it rests (25 U.S.C. 377). The regulations are silent as to proration of debts among the Indian heirs and as between Indian and non-Indian heirs.

The regulations leave the whole subject of payment of claims loose and uncertain. As a result the regulations are administered unfettered by the guide of statutory language and without regulatory direction. As might be expected the results are unfair, inequitable, and frequently in violation of the law.

For example, by administrative action the Secretary:

(1) Enforces old-age assistance claims as perpetual liens against the inherited trust property until the claim is paid. There never comes a time when the trust land is free of the lien unless the debt is paid, or unless the property passes to non-Indian heirs. This means that if an heir or devisee sells his inherited land 5, 10, or 20 years after distribution, the proceeds of the sale will be used to pay the claim. Compare *Margaret Dog Eagle* case, supra, p. 19;

(2) Collects the entire claim from the interest of one heir or devisee without any provision for proration among all heirs or devisees. The regulations make no provision for proration, 25 CFR Part 15.

(3) Collects the entire claim from the interests of the Indian heirs where there are both non-Indian and Indian heirs because he has no jurisdiction over the interests of the non-Indian heirs who take unrestricted. Title vests in all heirs at the same time, upon the decedent's death. The non-Indian inherits free from trust. *Levindale L. & Z. Min. Co. v. Coleman*, 241 U.S. 432 (1916). The Secretary cannot collect the old-age assistance claim from the non-Indian's share. He applies his collection processes to trust property held by Indian heirs for the benefit of creditors. The Indian heirs pay. The non-Indian heir takes his interest free of any lien, debt or claim. As administered by the Secretary, the trust created by law becomes a trust for the benefit of the non-Indian, not the Indian. An anomalous situation considering the safeguards imposed to preserve the trust property for Indians.

The injustice of this sort of administration is apparent. But although requested, the Department has refused to modify its regulations to provide a definite cut-off period for old age assistance claims and to provide for proration of debts. (See letter dated September 11, 1958, from the Acting Solicitor to Marvin J. Sonosky, G-58-1045.9).

D. *The concern for creditors is unwarranted.* The Solicitor expresses concern for the creditors of deceased Indians (61 I. D. 40-41). He explains that if the Secretary of the Interior does not collect, the creditors of deceased Indians will be left without a remedy to enforce their claims. The opinion goes so far as to impute dishonesty on the part of Congress, should the view be taken that trust property not available for the satisfaction of debts during the Indian's lifetime, continued unavailable after death (61 I. D. 40).

Persons dealing with Indians are well aware of the trust status of Indian property, and know that the judicial process cannot reach trust property. Trust assets are not used as a basis for granting unsecured credit.

The regulations recognize this. General creditors have last priority and if not paid in three years cannot collect from the estate. 25 CFR 15.25(b). It seems to us the concern is only for one class of creditors—namely, public welfare departments. This class is given highly preferred protection under the regulations and in practice the entire facilities of the Department are applied to collect these claims from any money received by heirs from the lease of the trust land or the sale of the trust land, at any time before or after distribution of the estate. Indeed the Department has gone so far as to give old age assistance claims priority over probate fees—a debt to the United States which Congress mandatorily has ordered shall be paid (25 CFR 15.25(c); 25 U.S.C. 377).

When a creditor advances funds or goods to an Indian he necessarily does so on the strength of the Indian's unrestricted assets. In the case of the State, the money is advanced because the applicant is qualified to receive the benefits of the Social Security Act. The fact that the applicant is an Indian with trust property protected by the laws of the United States ought not be used to his disadvantage.

The debt of South Dakota was not enforceable against the trust property during the lifetime of the decedent. Death did not convert an unsecured debt into an irrevocable top priority lien, backed by the facilities of the United States and enforceable until paid. The Secretary does not have power to pay trust funds of one Indian (heir) in satisfaction of the debts of another (decedent). Death does not alter the trust obligations to the Indian heirs. The power to determine heirs does not diminish the trust on the land. Congress did not preserve the trust property for the benefit of creditors.

E. *The adoption and escheat statutes do not support the "implied power" doctrine.* The Solicitor seeks comfort in two statutes, one relating to adoption and the other to escheat (61 I. D. 37). The adoption statute (25 U.S.C. 372a) directed that "In probate matters" under the Secretary's exclusive jurisdiction recognition of an Indian as an heir by reason of adoption was forbidden unless the adoption was in accord with prescribed requirements. It also specified that it did not apply "to the distribution of estates of Indians" who died prior to the effective date of the Act.

The Secretary places great stock in the phrases "probate matters" and "distribution of estates" as connoting recognition of the right to allow claims against the estate. Read in context the purpose of the statute is obvious. It was another measure to protect trust property, by preventing the estate from passing unrestricted to non-Indians "adopted" through informal means by the decedent during his lifetime. It had nothing to do with creditors. The selection of phrases, taken out of context from a statute designed for a purpose foreign to debts, furnishes a weak reed indeed, on which to rely for authority to collect debts from inherited trust property.

The opinion (61 I.D. pp. 40-41) also made much of the express language in the Escheat Act (25 U.S.C. 373a-373c) which directed that where a holder of a trust allotment dies without heirs the land should escheat to the tribe "subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate." The legislative history disclosed that the quoted language was added by way of amendment to the bill to make sure creditors were paid (61 I.D. pp. 40-41).

To us, this proves that when Congress intended to pay creditors from trust assets, it deemed it necessary to say so, in specific language. In the Escheat Act, where there were no Indian heirs, there was no reason for the trust guarantee contained in the General Allotment Act and related statutes. Even so, express language to pay creditors was employed.

A fortiori, where there are Indian heirs and the trust guaranty is applicable, creditors could not be paid in the absence of explicit language comparable to that contained in the Escheat Act. There is no such language.

F. *The "implied power" to pay debts is repugnant to the General Allotment Act and related statutes.* The Solicitor was confronted with the plain language of Section 5 of the General Allotment Act (25 U.S.C. 348) and the Act of June 21, 1906 (25 U.S.C. 354). Under one, the United States guaranteed to convey the land "free of all charge or incumbrance whatsoever"; under the other, the United States directed that no allotted land should become "liable for the satisfaction of any debt contracted prior to the issuing of the final fee patent therefor." The Solicitor recognized that these statutes barred enforcement of claims against inherited trust property. To overcome these statutes and to reach the desired conclusions the Solicitor was forced to hold that these bulwarks of Indian protection had been "set aside" by the 1910 Act authorizing the determination of heirs.

Thus, the Solicitor first read the power to enforce claims against trust property into the 1910 Act by implication. Then, he used this implied power to justify the construction that the 1910 Act again by implication repealed or set aside the plain language of Section 5 of the General Allotment Act and the 1906 Act. To put it another way, a power implied from the absence of language is used to justify repeal by implication of express guarantees inconsistent with the implied power. This is implication compounded to create legislation without benefit of Congress.

This approach violates all canons governing the construction of statutes, let alone Indian statutes. The great principles of trust established by the General Allotment Act cannot be repudiated by forced and inartificial statutory construction. Significantly, the Supreme Court found Section 5 of the General Allotment Act which the Solicitor "set aside," to be very much alive in *Squire v.*

Capoeman, 351 U.S. 1, 6 (1956). That section protected Indians from payment of Federal income taxes under a revenue act calling for a tax on the net income of every individual, derived from any source whatever. The Supreme Court has marked the path to be followed. Indian statutes are construed to benefit Indians, not creditors, who in extending credit never relied on trust property in the first instance.

Obviously the "implied power" to pay debts as administered by the Department is repugnant to the protective trust provisions of the General Allotment Act and related statutes. The Solicitor should have so held in 61 I.D. 37. We ask the Secretary so to hold now.

Respectfully submitted,

MARVIN J. SONOSKY,
Washington, D.C.,
Attorney for Appellants.

Of Counsel:

RAMON A. ROUBIDEAUX,
Fort Pierre, S. Dak.

JUNE 5, 1959.

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 1959, I furnished by mail a copy of the foregoing notice of appeal to Lowell A. Wheaton, Examiner of Inheritance, Pierre, South Dakota, and to each of the parties who share in the estate as follows: Department of Public Welfare, Pierre, South Dakota; Mary Hit Him Running Horse, Parmelee, South Dakota; Elizabeth Running Horse Iron Shell, St. Francis, South Dakota; Genevieve Running Horse, Parmelee, South Dakota; Leo Running Horse, Parmelee, South Dakota; Rosebud Sioux Tribe, Rosebud, South Dakota.

MARVIN J. SONOSKY.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Mary Hit Him Running Horse, Anzonetta Running Horse Two Eagle, Elizabeth Running Horse Iron Shell, Leo Running Horse, Genevieve Running Horse, c/o Rosebud Sioux Indian Agency, Rosebud, South Dakota, Plaintiffs, v. Fred A. Seaton, Secretary of the Interior, Department of the Interior, Washington 25, D.C., Defendant

Civil No. —

COMPLAINT FOR JUDICIAL REVIEW OF ACTION OF SECRETARY OF THE INTERIOR, FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

The plaintiffs for their complaint allege as follows:

1. The plaintiffs are citizens of the United States, residents of the Rosebud Sioux Indian Reservation, South Dakota, and are Indians duly enrolled as members of the Rosebud Sioux Indian Tribe of South Dakota.
2. The defendant is the Secretary of the Interior, and as such, is charged with the administration of the laws relating to the supervision, care and protection of individual Indian trust or restricted property, including the trust property here in suit.
3. The jurisdiction of this Court is invoked under Title 11, sections 305 and 306, District of Columbia Code, and under the general equity jurisdiction of the Court. Plaintiffs seek relief also under the provisions of section 10 of the Administrative Procedure Act of June 11, 1946, c. 646, 60 Stat. 243, 5 U.S.C. 1009; and under the terms of the Declaratory Judgment Act (28 U.S.C. 2201; 2202). The amount in controversy exclusive of interest and costs exceeds \$3,000.
4. Plaintiffs are the lawful heirs of James Running Horse, a fullblood Indian enrolled in the Rosebud Sioux Indian Tribe of South Dakota, who died intestate seized of the certain property held by the United States in trust for him and his Indian heirs including 172.07 acres of land on the Rosebud Reservation described as the E/2NE/4, Lots 1, 4, sec. 21, T. 38 N., R. 33 W., 6th P.M.
5. The above described land originally was allotted by trust patent No. 276674 dated June 18, 1912, from the United States to Abraham Running Horse, Rosebud Sioux Allottee No. 6095, and inherited by James Running Horse from the trust patentee. The trust patent was issued under the General Allotment Act

of February 8, 1887, c. 119, sec. 5, 24 Stat. 389, as amended (25 U.S.C. 348), and under its terms the United States agreed to hold the land, subject to all statutory provisions and restrictions, "in trust for the sole use and benefit," of Abraham Running Horse or, in the case of his death, of his heirs; and further agreed, upon the expiration of the trust period, to convey the land to Abraham Running Horse or, in case of his death, to his heirs, "in fee, discharged of said trust and free of all charge or encumbrance whatsoever; * * *." The initial trust period of 25 years specified in the patent was duly extended as provided by law and is now and has been in effect at all times material to this case.

6. Pursuant to law in such case provided (25 U.S.C. 372), the Secretary of the Interior, through his duly authorized Examiner of Inheritance, entered an order dated October 17, 1958, determining the plaintiffs to be the heirs of James Running Horse, deceased, with respect to the trust property owned by James Running Horse at the time of his death.

The Examiner's order determining heirs allowed the claim of South Dakota, Department of Public Welfare, in the amount of \$3,774.50 for old-age assistance payments made to the decedent during his lifetime "in full, after payment of the costs of the hearing, or in the amount of the cash on hand to the credit of the estate at the time of decedent's death plus the gross income accruing to the estate for the period of five (5) years following the death of the decedent, whichever is less." The order in effect directs payment from the trust cash on hand at the time of decedent's death, plus the gross income accruing from the trust property for five years. In this case, the trust cash on hand at the time of decedent's death amounted to \$15.65.

7. Plaintiffs, in accordance with the applicable regulations petitioned for a rehearing insofar as the order determining heirs allowed the claim of the State of South Dakota. The petition was denied by the Examiner of Inheritance by ordered dated January 6, 1959. Thereafter, plaintiffs duly appealed to the defendant. By decision dated May 26, 1960, the action of the Examiner of Inheritance was affirmed and the appeal dismissed. The plaintiffs have exhausted their administrative remedy.

8. The action of the defendant in upholding the claim of South Dakota makes the claim a charge or encumbrance against the trust property and the trust proceeds derived therefrom for a period of five years after decedent's death. This action is beyond the authority vested in the Secretary of the Interior and is unlawful and void in that:

a. The Secretary is not authorized by law to allow debts incurred by an Indian decedent as a charge or encumbrance against the trust property left by the decedent or as a charge against such trust property in the hands of the decedent's Indian heirs.

b. The action of the Secretary violates the obligations of the United States to hold the land in trust for the sole use and benefit of the plaintiffs, as the Indian heirs of the decedent, and to deliver the trust property and the trust proceeds derived therefrom to the heirs free and clear of all charges or encumbrances whatsoever.

Wherefore plaintiffs pray:

1. That the defendant and those acting under his authority be enjoined *pendente lite* and permanently from making payments to the State of South Dakota out of any trust property owned by plaintiffs or out of trust property owned by James Running Horse (RS-4676) at the time of his death or trust proceeds thereafter accruing from the trust property of which he died seized;

2. That the Court review the actions of the defendant under the provisions of section 10 of the Administrative Procedure Act (5 U.S.C. 1009);

3. That it be ordered, adjudged and decreed that the defendant is without authority to allow the claim of the State of South Dakota or to pay such claim out of trust property owned by plaintiffs or of which James Running Horse died seized, including trust income accruing from land or other property held in trust by the United States for plaintiffs as Indian heirs of James Running Horse, deceased;

4. That so much of the order dated October 17, 1958, determining heirs which purports to allow payment of the claim of the State of South Dakota out of trust property owned by plaintiffs or of which James Running Horse died seized, including trust income accruing from land or other property held in trust by the United States for plaintiffs as Indian heirs of James Running Horse, deceased be set aside as null and void;

5. That it be ordered, adjudged, and decreed that the plaintiffs are the owners of the trust property of which James Running Horse (RS-4676) died seized, in the proportionate shares as determined by the Examiner of Inheritance, free and clear of the charge and encumbrance of the claim of the State of South Dakota;

6. That defendant pay to plaintiffs the costs of this action; and

7. That plaintiffs have such other and further relief as is just and equitable.
Respectfully submitted.

MARVIN J. SONOSKY,
Washington, D.C.,
Attorney for plaintiffs.

Of Counsel:

JOHN S. WHITE,
Washington, D.C.

WILKINSON MEMORANDUM FOR SENATE SUBCOMMITTEE ON INDIAN AFFAIRS
RE S. 1392 AND H.R. 8077

We are general counsel for the following tribes of Indians: The Arapahoe Tribe of Wyoming; the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Mont.; the Quinaielt Tribe of Washington; and the Spokane Tribe of Washington.

Hearings on the above and related bills were held before your subcommittee on August 9 and 10, 1961. Our representative at the hearings did not ask to testify because as yet we have no precise instructions from our general tribal clients. However, even though we have no specific instructions from our clients, we think the following memorandum accords with their general wishes which have been made known to us from time to time in the past.

The subcommittee is now considering one of the most vexing problems in Indian affairs: the fractionated heirship problem. The problem has existed for years. Only Congress can solve it in the case of most tribes. We have no doubt that our clients hope for remedial legislation as quickly as possible consistent with a wise and mature consideration of the many facets of the problem.

The fractionated heirship difficulty is not the doing of Indian tribes. It is hardly appropriate, at this juncture, to attempt to ascribe responsibility for the situation. Nevertheless, it results from what many regard as an unfortunate and misguided policy adopted by Congress decades ago. It was a policy (or experiment) designed to alter the centuries-old cultures of Indian tribes—to make them farmers in the image of their conquerors. The well-respected Merriam report conducted by the Brookings Institution and requested by Secretary of the Interior Work on June 12, 1926, explained it in the following manner:

"It almost seems as if the Government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction. Individual ownership has in many instances permitted Indians to sell their allotments and to live for a time on the unearned income resulting from the sale. Individual ownership brought promptly all the details of inheritance, and frequently the sale of the property of the deceased Indians to whites so that the estate could be divided among the heirs. To the heirs the sale brought further unearned income, thereby lessening the necessity for self-support. Many Indians were not ready to make effective use of their individual allotments. Some of the allotments were of such a character that they could not be effectively used by anyone in small units. The solution was to permit the Indians through the Government to lease their lands to the whites. In some instances Government officers encouraged leasing, as the whites were anxious for the use of the land and it was far easier to administer property leased to whites than to educate and stimulate Indians to use their own property."

The solution recommended by the Brookings Institution study was stated in the following language:

"The Government itself, through the use of a revolving fund, should purchase the inherited land and sell it to the Indians subject to restrictions, using their accumulation of inherited funds as part or all of the purchase money. If the inherited funds are not sufficient liberal reimbursable terms should be arranged. The object sought would be twofold, to prevent the rising generation of Indians from being landless and to stop the use of inherited money as a means of sustaining the Indians in a life of irresponsible idleness * * *. The estates

could be purchased by the Government and sold to the Indians in workable units, subject to restrictions."

H.R. 8077

We find the following objections to this bill:

1. Section 3 (b) and (c). Issuance of scrip instead of legal tender, to the Indian owners may not constitute just compensation. The Secretary may pay cash on barrelhead, which would eliminate the problem. Or, if the owner were paid in guaranteed installments, with interest, the just compensation problem might be avoided. But if the Secretary exercises his power to issue certificates (and writing this power into the bill may encourage its use), the owners will have only a lien on income from the land. The owner's compensation might then depend on the use the tribe or tribe's lessee makes of the land, and this might well be too indefinite to amount to just compensation. Conceivably, a penniless tribe might let the land lie idle, in which case the former owner would get nothing.

2. Section 5(b). There may be a constitutional objection to the arrangement whereby a tribe may purchase a fractionated interest for less than the owners could obtain from other sources. That is, "appraised value" may be less than fair market value, and hence less than just compensation.

S. 1392

We have the following objections to this bill:

1. Section 1 provides for involuntary sale unless the Secretary of the Interior finds that the proposed sale is not in the best interest of the Indian owners. Conceding that the individual owners have the greatest interest, we submit also, in some cases, that there is a tribal interest which must be protected. This might occur in reservations involving grazing lands, where contiguous units are required, or in timberlands where overall sustained yield is beneficial for all—the tribe and the fractionated owner.

2. Section 4 gives the tribe nothing more than a right to participate in an auction, on the same footing as any other bidder. The roadblocks occasioned by the many prerequisites to obtaining a loan would virtually nullify such a possibility for tribes without adequate resources. Even a tribe with resources would be vulnerable, since the limits within which its representative could bid would inevitably be known, considering the way tribal business is conducted, with the result that it would always be bid up to its maximum.

3. The referendum required in section 5(e) as a condition precedent to obtaining a loan alters the democratic processes of all Indian tribes of which we are aware. All tribes of which we have knowledge operate through their general councils (adult members present and voting at a meeting, much in the nature of an old New England town meeting) or through their tribal councils, business committees, executive committees, or similar bodies (equivalent to boards of directors of corporations). This method of doing business has been recognized and concurred in by the United States for many decades. The drastic alteration proposed by section 5(e) would not only alter this accepted practice, it would make it virtually impossible for tribes without resources to obtain loans necessary to protect the tribal land base. Moreover, the requirement of a majority of adults on and off the reservation may be an impossible one in the case of some tribes, who have many members in distant cities who care nothing about tribal affairs, and would not respond to solicitation for a vote.

4. Section 10 places on the Secretary of the Interior the responsibility for reviewing each title where the trust extends beyond January 1, 1964, and requires him to terminate the trust unless he finds that the Indian owner meets the competency test spelled out in section 10(b). In our judgment, this is nothing short of "termination" of the trust responsibility. This may be what Congress desires, but it is objected to strenuously by our clients, and we believe it will lead, drastically and quickly, to deprivation of Indian communities of the inadequate land base still held by them. We submit that a "solution" of the heirship problem should not be accompanied by "termination." The latter should at least be the subject of separate legislation.

SUBSTITUTE BILL

We appreciate that it is not helpful to Congress to receive only criticism of pending legislation. We are aware that this is a difficult problem, and we congratulate the subcommittee for attacking it. To be as helpful as possible, we submit for your consideration a bill which we believe would combine desirable features of S. 1392 and H.R. 8077. In this redraft we have also considered bills introduced in past Congresses, such as S. 1784, 84th Congress; H.R. 4226 and H.R. 4512, 85th Congress; and H.R. 2787, S. 2236, and H.R. 5424 of the 86th Congress. A draft of a bill embodying our ideas is attached.

The draft is based primarily on H.R. 8077, plus the loan provisions of S. 1392, plus a voluntary partition paragraph. Other deviations from 8077 are relatively minor.

Section 1 (c). Definitions.—Defines "restrictive lands" to mean both lands subject to a restriction on alienation, and trust lands. There is no practical distinction between the two types of title, at least for purposes of this bill, and the single term for the two is convenient and often used by Indian attorneys.

Section 2. Policy.—We added some language to section 2 of H.R. 8077, see especially the next to last sentence.

Section 3. Voluntary sale.—H.R. 8077 does not have a voluntary sale clause. We believe that a voluntary sale provision would permit clearing up a large number of fractionated tracts and should be put in the bill. Voluntary sale is already permitted under law, but we have added a preferential right in the tribe to buy the land. Also, the Secretary's representative powers (see section 9 below) would be necessary for voluntary sales, and he does not have such powers under present law.

Section 4. Involuntary sale.—This is based on section 5 of H.R. 8077. Instead of requiring a majority consent to partition or sale, our draft requires only 20 percent which comes closer to State law, where any one owner can demand partition. Also, a majority consent might be difficult to obtain even in a proper case, and would tend to promote the tying up of property which Congress is seeking to alleviate.

We endorse H.R. 8077's preferential right in the tribe to buy the land at fair market value.

Section 5. Secretarial sale.—Based on section 3 of H.R. 8077. Some people call this a condemnation or eminent domain clause, while the Interior Department calls it a carrying out of trustee's responsibility clause. In either event, we believe it would be preferable to pay the owners in cash, and not in delayed and only partially secured notes. If just compensation rules apply, the latter would not be legally permissible.

In section 5(b) we suggest a new and alternative way (by arbitration) for objecting owners to have a determination of fair market value. Owners selecting this method, which would be cheaper and easier for them than a lawsuit, would be barred from going into court on that question. And the method may very well yield a result as fair and accurate as the judicial method. The requirement that the objecting owner pay for his own appraiser would discourage frivolous and what-can-we-lose claims.

Section 6. Leases.—This is substantially section 4 of H.R. 8077, with the addition of a preferential right in the tribe to lease the property. Also, we give 50 percent or more of the owners a veto power.

Section 7. Secretary's finding of best interest.—This is derived from section 5(a) of H.R. 8077. We think it should govern all sales, partitions, and leases, so we put it in a separate paragraph.

Section 8. Notice.—This is section 7 of H.R. 8077, except that we would give notice to owners of a proposed lease as well as a proposed sale.

Section 9. Representation by Secretary.—This is one of the most important sections in the bill. Without it, or one like it, the fractionation problem cannot be solved. It is derived from section 5 of H.R. 8077, but should apply to all sales, partitions, and leases.

Section 10. Nature of title conveyed.—This is derived from sections 3, 5, 5(c), and 6 of H.R. 8077, with additions.

Section 11. Loans.—This is the same as section 5 of S. 1392, with the deletion of some of the more cumbersome conditions; we would let the Secretary set such conditions as he saw fit.

Also, in section 11(b), we suggest that the tribes be given a preferential interest rate, such as in the case of the REA or Honduras, to name a few examples.

Also, we would give the Secretary discretion whether or not to use money judgments to pay off loans. Conceivably a judgment would be small, and the need for other things pressing. To require immediate payment of the debt might cause hardship; we think it is far better to give the Secretary discretion to do as the particular situation warrants.

Section 12. Loans.—Same as section 9 of S. 1392.

Section 13.—Same as section 8 of H.R. 8077.

Section 14.—Mere procedural clauses relating to distribution. We added the clause permitting escheat of unknown or missing owners' proceeds after 7 years, similar to 25 U.S.C. 373a.

Sections 15 and 16.—Same as sections 9 and 10 of H.R. 8077.

CONCLUSION

We commend the subcommittee for its obvious effort to report out a comprehensive, wise, heirship bill, and we wish it every success.

Sincerely,

WILKINSON, CRAGUN & BARKER.
By GLEN A. WILKINSON.

ATTACHMENT 1

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. (a) "Secretary" shall mean the Secretary of the Interior.

(b) "Indian tribe" or "tribe" shall include any recognized tribe, band, group, community, or pueblo of Indians.

(c) "Restricted lands" shall mean any real property in which any interest is vested in any individual Indian or Indian tribe subject to a restriction against alienation without the approval of the Secretary, or any real property in which any interest is held by the United States in trust for the use and benefit of an Indian or Indian tribe.

(d) "Fractionation" shall mean the results of the process by which the beneficial ownership of a restricted tract of land has vested in numerous owners, who own as undivided tenants in common.

POLICY

SEC. 2. It is hereby declared to be the public policy of the United States that restricted Indian lands shall be used productively for support and advancement of Indians or Indian tribes. The Congress finds that the historical system of allotments to individual tribal members constitutes an impediment to full productivity and effective management when fractionation of ownership interests in restricted lands has occurred through descent and distribution to multiple heirs who hold undivided interests as tenants in common. It is the purpose of this Act to promote the consolidation of such fractionated lands, preferably through acquisition by the tribes or by individual Indians; to provide for economic utilization of Indian land holdings; and decrease the cost to the United States of administration of multiple interests and uneconomic Indian land holdings. The Secretary of the Interior is authorized and directed to take such action and to devise such plans or programs under the provisions of this Act as will give effect to the policy expressed herein.

VOLUNTARY SALE OR PARTITION

SEC. 3. Whenever all of the owners of a restricted tract of land agree to a sale or partition, the Secretary may sell or partition the tract according to the wishes of the owners: *Provided*, That except in the case of a proposed sale to one or more of the owners, the tribe occupying the reservation within or near which

the tract is located shall be given a preferential right to buy the tract at its fair market value.

INVOLUNTARY SALE OR PARTITION

SEC. 4. Whenever requested by an owner or owners of 20 per centum or more interest in a restricted tract, or on his own initiative as a representative of such an owner or owners under section 9, the Secretary may, in his discretion, partition the tract among the owners, or in the alternative, sell the tract by competitive bidding: *Provided*, That a tribe shall have a preferred right to purchase at the fair market value any tract offered for sale located within or adjacent to its reservation.

SECRETARIAL SALE OF UNPRODUCTIVE TRACTS

SEC. 5. (a) Whenever the Secretary determines that any restricted tract located within or adjacent to an Indian reservation, is idle or economically unproductive because of fractionation of ownership interests or because the tract is so small or so isolated that its economic use is impeded, he is authorized to sell the tract at fair market value to the tribe occupying the reservation, with the consent of the tribe. The consent of the owners is not required, but notice and hearing shall be given in accordance with section 8.

(b) Fair market value shall be initially determined by the Secretary. If any owners whose interests total 20 per centum or more object to the value determined by the Secretary, they may engage an appraiser at their own expense, whereupon the Secretary shall designate an appraiser at the expense of the United States; and the two appraisers shall elect a third appraiser, and the consideration shall be the fair market value as determined by a majority of the three appraisers. The expense of the third appraiser shall be paid out of the proceeds of the sale. The decision of the appraisers shall be nonreviewable except for clear abuse of discretion. An owner's election to determine fair market value in accordance with this subsection shall be deemed a waiver of any right to judicial determination of fair market value.

LEASES, TIMBER SALES, AND EASEMENTS

SEC. 6. Whenever the Secretary determines that fractionation of ownership interests is preventing the effective use of any restricted lands for which he would otherwise be authorized by law to execute or approve a contract or lease for the restricted interests, he is hereby authorized, in his discretion, but not over the objection of 50 per centum or more of the owners, (a) to execute a lease for the use of such lands or extraction of minerals therein, (b) to execute a contract for the sale of any of the timber on such lands, or (c) to grant an easement over such lands, such action to be binding upon the owners of both restricted and unrestricted interests. Such leases and sales under (a) and (b) shall be by competitive bidding, and a tribe shall have a preferred right to meet the high bid on any lease or sale located within or adjacent to its reservation.

BEST INTEREST OF OWNERS

SEC. 7. The Secretary shall make no sale, partition or lease under this Act unless he first finds that such sale, partition, or lease is in the best interest of the owners of the tract, and not unduly detrimental to the tribe or to the local Indian community.

NOTICE

SEC. 8. The Secretary shall give actual or constructive notice to each owner of any action proposed to be taken under sections 3, 4, 5, or 6 of this Act, and shall provide an opportunity for any party in interest to submit written or oral objection to the proposed action.

REPRESENTATION BY SECRETARY

SEC. 9. In the case of any sale, partition, or lease under this Act, the Secretary may represent, give the consent of and lease or convey the interest of any Indian or non-Indian owner who is an infant, or is non compos mentis, or whose ownership interest in a decedent's estate has not been determined, or who, after reasonable effort cannot be located or fails or refuses to respond to notice, or whose interest does not exceed a sixteenth portion of the tract involved.

NATURE OF TITLE CONVEYED

Sec. 10. Title conveyed by the Secretary pursuant to a sale under this Act shall include the complete interests of all owners, restricted or unrestricted, Indian or non-Indian. Title acquired by a tribe pursuant to a sale under this Act shall be taken either in a trust or fee status, the same as the prevailing title status of other tribal lands within the reservation. Title acquired by an Indian who is determined by the Secretary to need assistance in handling his affairs, or by an Indian who already owns a trust or restricted interest in such lands, may be taken in the name of the United States in trust for such Indian, or in the name of the Indian subject to the usual restrictions against alienation and taxation. Title acquired by any other transferee shall be taken in fee simple absolute, free of any trust or interest in the United States, and free of all restrictions against alienation or taxation imposed by the United States.

Sec. 11. (a) In order to assist tribes that wish to purchase land offered for sale under the provisions of this Act, the Secretary is authorized to make a loan to any tribe under such conditions as he sees fit. Such loan shall be made from the revolving funds referred to in section 12 of this Act.

(b) The loan shall be for a term of not to exceed twenty-five years, and shall bear interest of one-half the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the month in which the loan is made, as such rate is determined by the Secretary of the Treasury.

The loan need not be repaid in equal installments, but it shall be repaid according to a schedule that will fully amortize the loan within the time specified. In the event of a default in the repayment of the loan, the Secretary shall take such action as he deems necessary to protect the interests of the United States. If during the period of repayment the tribe is awarded a money judgment against the United States in excess of the unpaid balance of the loan, the unpaid balance may in the discretion of the Secretary be paid from the appropriation to satisfy the judgment.

Sec. 12. (a) All funds that are now or hereafter a part of the revolving fund authorized by the Act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1968), and the Act of April 19, 1950 (64 Stat. 44), as amended and supplemented, including sums received in settlement of debts of livestock pursuant to the Act of May 24, 1950 (64 Stat. 190), sums collected in repayment of loans heretofore or hereafter made, and sums collected as interest or other charges on loans made, shall hereafter be available for loan to organizations of Indians, Eskimos, and Aleuts (hereinafter referred to as Indians), having a form of organization that is satisfactory to the Secretary, and to individual Indians of one-quarter degree or more of Indian blood who are not members of or eligible for membership in an organization that is making loans to its members, for any purpose that will promote the economic development of such organizations and their members, or the individual Indian borrowers.

(b) The appropriation authorization in section 10 of the Act of June 18, 1934 (48 Stat. 986), is hereby amended by increasing it from \$10,000,000 to \$50,000,000.

EXECUTION OF TITLE DOCUMENTS

Sec. 13. The Secretary is authorized to execute such patents, deeds, assignments, releases, certificates, orders, leases, contracts, or other instruments as may be necessary or appropriate to carry out the purposes of this Act.

DISTRIBUTION OF PROCEEDS

Sec. 14. The proceeds of any sale or lease pursuant to this Act shall be distributed to the owners. In the case of owners of restricted interests, the Secretary may distribute their proceeds, or hold or use the proceeds for their benefit, the same as in the case of other restricted funds. The shares of owners whose whereabouts are unknown, and the shares of unprobated estates that are not subject to the jurisdiction of the Secretary, shall be deposited in the Treasury of the United States and held until claimed by persons lawfully entitled thereto. If unclaimed within seven years the deposit shall escheat as if property of an heirless Indian under 25 U.S.C. 373a.

REGULATIONS

SEC. 15. The Secretary is authorized to issue such regulations as are necessary to carry out the purposes of this Act.

NONREPEALER

SEC. 16. This Act shall not repeal any authority of the Secretary under other law, but it shall supersede any limitation on the authority of the Secretary that is inconsistent with this Act.

COMMISSION ON INDIAN AFFAIRS, STATE OF NEW MEXICO,
Santa Fe, N. Mex., August 1, 1961.

HON. DENNIS CHAVEZ,
Senate Office Building, Washington, D.C.

DEAR SENATOR CHAVEZ: Chairman Martin Vigil of the All-Pueblo Council, Gov. Ralph P. Lovato, of Santo Domingo, and Gov. Fred Cordero, of Cochiti, have asked me to convey to you their sincere thanks for your kindness and consideration in notifying them of the hearing on the heirship bill on August 9 and to express to you their thinking on this effort to resolve the existing chaos in fractionated heirship lands.

They cannot afford the trip to Washington, but are glad to give their opinion, even though the problem of heirship lands is not great among the Pueblos.

Basically, they feel that the provision of the proposed legislation (S. 1392), which authorizes the Secretary of the Interior to issue fee patents to owners of these tiny pieces of land, is not in the best interest of the tribes because of the danger that much Indian land might go out of tribal hands.

In so many cases, the heirs are in a condition of extreme poverty, and they would dispose of their land as quickly as possible, thus depriving the tribe of it.

They like the idea of the tribes being allowed to borrow money to buy up these tracts of land—where the tribal treasury does not permit buying it up outright—but they do not like the provision that the Secretary may issue fee patents, for this would certainly result in a loss of land to the Indians. Instead, they like the recommendations of the task force report, that the Secretary be authorized “to transfer the beneficial interest in a highly fractionated allotment from the heirs to the tribe and to arrange with the tribe to compensate the individual owners to the extent of the fair market value of the land.”

If the tribe should not want the land, or if there should be some good reason for not turning the land over to the tribe in trust status, a different plan could be worked out. But they think it is extremely important that tribal lands remain in trust status and guaranteed against loss resulting from the issuance of fee patents or by any procedure that might result in further loss of Indian lands.

These Pueblo officials would be glad to have their views presented to the committee and made part of the record, if, in your opinion, this is desirable.

We all hope that this finds your health greatly improved and that you will enjoy a speedy recovery.

With best wishes,

Sincerely,

CHARLES E. MINTON, *Executive Director.*

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