

TESTIMONY
OF
WAYNE NORDWALL
DIRECTOR, WESTERN REGION
BUREAU OF INDIAN AFFAIRS
U.S. DEPARTMENT OF THE INTERIOR
ACCOMPANIED BY
D. JEFF LORDS
ACTING DEPUTY SPECIAL TRUSTEE - TRUST ACCOUNTABILITY
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS
U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
HEARING ON
S. 550, THE “AMERICAN INDIAN PROBATE REFORM ACT OF 2003”

May 7, 2003

Mr. Chairman, Mr. Vice Chairman and Members of the Committee, I am pleased to be here today to provide the Administration's views on S. 550, a bill to amend the Indian Land Consolidation Act to improve provisions relating to probate of trust and restricted land. The Department commends the efforts of this Committee in the work that you and your staff have done over the years concerning the trust reform activities. We appreciate the support you have provided us. However, much work remains to be done.

While we support many of the concepts embodied in S. 550, specifically the creation of a uniform probate code, we would like to work with you to further refine the bill. In particular, we believe more work must be done on the bill to ensure that the probate provisions of ILCA are clear, concise, predictable and comprehensive. The history of fractionation legislation has been that key provisions are deleted because of minority opposition. Hard decisions must be made that will benefit the

majority of Indian country.

Addressing the many problems associated with fractionated lands is a high priority within this Administration. We must find better ways to consolidate Indian land ownership in order to restore full economic viability to Indian landowners of their assets, and to reduce the tremendous administrative burden for the management of these assets. In fact, the President's FY 2004 budget proposal includes a request for \$21 million for Indian land consolidation, an increase of \$13 million.

We welcome the opportunity to work closely with the Committee to craft legislation that would better meet the dual goals of probate reform and the consolidation of fractionated land.

BACKGROUND

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

There are approximately 230,000 open individual Indian money accounts, the majority of which have balances under \$100 and annual transactions of less than \$1,000. Interior maintains thousands of accounts that contain less than one dollar, and has a responsibility to provide an accounting to all account holders. Unlike most private trusts, the Federal Government bears the entire cost of administering the Indian trust. As a result, the usual incentives found in the commercial sector for reducing the number of accounts do not apply to the Indian trust.

Over time, the system of allotments established by the General Allotment Act (GAA) of 1887 has resulted in the fractionation of ownership of Indian land. As original allottees died, their heirs received an equal, undivided interest in the allottee's lands. In successive generations, smaller undivided interests descended to the next generation. Fractionated interests in individual Indian allotted land continue to expand exponentially with each new generation. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands, a situation the magnitude of which makes management of trust assets extremely difficult and costly. These four million interests could expand to 11 million interests by the year 2030 unless an aggressive approach to fractionation is taken. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest.

In 1983 and 1984, Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA). The Act authorized the buying, selling and trading of fractional interests and for the escheat to the tribes of land ownership interests of less than 2 percent. The United States Supreme Court held the escheat provision contained in ILCA as unconstitutional. See *Hodel v. Irving* (481 U.S. 704 (1987)) and *Babbitt v. Youpee* (519 U.S. 234 (1997)). As a result, Committee staff, the Department, tribal leaders, and representatives of allottees worked together to

craft new ILCA legislation. This cooperation led to enactment of the Indian Land Consolidation Act Amendments of 2000.

The 2000 amendments established uniform rules for the descent and distribution of interests in allotted lands. The amendments contained provisions preventing lands from being taken out of trust when inherited by non-Indians by creating a life estate for those beneficiaries with a remainder in interests going to close Indian family heirs (with conditions depending on the percentage of interest) or, if none exist, the tribe having jurisdiction over the parcel. The legislation also contained provisions for the consolidation of fractional interests. Tribes and individual allotment owners can consolidate their interests as well as purchase, sell, or exchange them. The legislation also enhanced opportunities for economic development by laying out a formula specifying the percentage of owners of fractional interests that must consent to leasing agreements. Finally, the amendments extended the Secretary's authority to acquire fractional interests through the Indian land acquisition pilot program, establishment of an Acquisition Fund, and the authorization of annual appropriations to help fund the acquisitions. Under ILCA, the Secretary is required to certify that she has provided certain notices about the probate provisions of the 2000 amendments before they become effective.

PROBATE REFORM

There is a clear need for probate reform. As it currently stands, the Department applies 33 different state laws when probating individual trust estates. By using 33 separate state laws, there is a lack of consistency and predictability in administering probates in Indian country. In addition, we must probate for all interests regardless of the size of the account. For example, we have to probate a decedent's estate (at an average cost of \$1,400 a probate) and identify and locate all heirs regardless of the value of the estate. As of December 31, 2002 there were 1,522 open estate accounts where the funds derive only from per capita or judgment payments (and not income from land interests) with a combined, total value of \$7,194. This averages out to under \$5 per account.

Last Congress, former Assistant Secretary Neal McCaleb testified in support of the enactment of a uniform intestate code for trust and restricted estates. However, because of the complexity that S. 550 would build into the proposed uniform code, we would like to work with the Committee to try to simplify these provisions. The Department's employees are expected to administer the provisions of ILCA and to encourage tribal members to draft wills, and eventually to probate those wills and estates. Therefore, the provisions must be clear.

The benefit to the heirs of a uniform probate code for trust and restricted estates is that the same law will be applied to all the trust and restricted estates of the decedent no matter where the real property is located. A uniform intestate probate code will allow the entire estate to be probated under one set of laws, and those laws will be the same throughout the United States. The Indian tribes and individuals holding interests in allotted lands in the 33 states will benefit from the clarity, consistency and predictability of using a uniform probate code. A uniform probate code, built upon current state probate practices and the Model Uniform Probate Code, will help the Department decide cases and issue orders in a more timely manner, resulting in fewer appeals. If a uniform

probate code is enacted, the Department will no longer need to research the laws and legal decisions of 33 individual states. It will therefore take less time to issue an order determining heirs. Finally, a uniform probate code will serve as a model for tribes to develop their own tribal probate codes.

INDIAN LAND CONSOLIDATION PILOT PROGRAM

The Indian Land Consolidation Pilot Program is a high priority for this Administration. The President's 2004 Budget requests \$20.98 million for Indian land consolidation through the acquisition of fractionated ownership interests. This \$13.1 million increase will support our plans to expand the program to new Indian reservations.

The BIA has been conducting the pilot program since FY 1999 in the Midwest region. These pilot projects have successfully demonstrated that large numbers of owners are willing to sell fractionated ownership interests, and that a purchase program can be administered at a reasonable cost. When the projects started, there were approximately 87,000 interests on three reservations. To date, we have purchased over 40,000 interests on those three reservations. However, because of the runaway growth of fractionation we still have the same number of outstanding interests as when the projects began. Without this pilot program, the number would be far higher than 127,000 since the interests purchased would have further fractionated. As reflected in the Administration's Program Assessment Rating Tool (PART) review, the pilot program has taught valuable lessons about the need to target purchases to maximize the return of the land to productive use and to reduce the number of Individual Indian Money (IIM) accounts.

This year, the Department is developing a strategic plan to guide program expansion, target purchases to reduce future costs of trust administration, and enhance tribal economic development opportunities. A national program office has been established to coordinate and oversee the program expansion and standardize business practices, which may use contractual arrangements with Tribes or private entities to purchase individual interests on behalf of the Department. The FY 2003 budget, together with carry-over balances, will provide approximately \$20 million for the BIA to put in place the necessary infrastructure and contractual arrangements to support our planned expansion in FY 2004. Our strategic plan, including legislative proposals, will be provided to the Committee later this summer.

CURRENT EFFORTS

Last year, the Department held a two-day meeting of a subgroup of the DOI/Tribal Task Force on Trust Reform to address the Indian Land Consolidation Act and to encourage a dialogue on potential solutions to the fractionation issue. Participants were encouraged to develop creative ideas, and a number of possible legislative and administrative solutions were discussed. Many of the ideas developed merit further, serious consideration by the stakeholders.

To provide a forum to continue this dialogue, the Department published a notice in the *Federal Register* on April 22, 2003 requesting nominations for Tribal officials to participate in a Working

Group on Land Consolidation (Working Group). We are seeking participation by Tribal officials from tribes with highly fractionated lands or those who have a strong interest in resolving the problem of fractionated lands to discuss the problems caused by fractionation and to examine the universe of possible solutions. This Working Group will meet throughout the summer. We anticipate that the Working Group will provide important input on recommendations for legislative action to address solutions to fractionation.

CONCLUSION

Thank you, Mr. Chairman, Mr. Vice Chairman and Members, for taking the lead on these important issues for Indian people and the trust reform. This concludes my statement. I will be happy to answer any questions you may have.