

**S. 1721, A BILL TO AMEND THE  
INDIAN LAND CONSOLIDA-  
TION ACT TO IMPROVE PROVI-  
SIONS RELATING TO PROBATE  
OF TRUST AND RESTRICTED  
LAND.**

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**LEGISLATIVE HEARING**

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

Wednesday, June 23, 2004

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**LEGISLATIVE HEARING ON S. 1721, TO  
AMEND THE INDIAN LAND CONSOLIDATION  
ACT TO IMPROVE PROVISIONS RELATING  
TO PROBATE OF TRUST AND RESTRICTED  
LAND, AND FOR OTHER PURPOSES.**

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**Wednesday, June 23, 2004  
U.S. House of Representatives  
Committee on Resources  
Washington, D.C.**

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The Committee met, pursuant to call, at 10 a.m., in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo [Chairman of the Committee] presiding.

Members Present: Representatives Pombo, Walden, Hayworth, Osborne, Renzi, Pearce, Bishop, Rahall, Faleomavaega, Pallone, Inslee, Udall of New Mexico, Udall of Colorado, Grijalva, and Herseth.

**STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

The CHAIRMAN. The Committee on Resources will come to order. The Committee is meeting today to hear testimony on S. 1721, the American Indian Probate Reform Act of 2004.

The CHAIRMAN. Under Rule 4(g) of the Committee Rules, any oral opening statements at hearings are limited to the Chairman and Ranking Minority Member. This will allow us to hear from our witnesses sooner and help Members keep to their schedules. Therefore, if other Members have statements, they can be included in the hearing record under unanimous consent.

The CHAIRMAN. The bill on which the Committee is receiving testimony today addresses one of the major problems that led to the Indian Trust Fund lawsuit, the fractionalization of Indian land and the lack of sound Federal or tribal probate laws. The Cobell lawsuit arose from the historic failure of past Administrations to properly account for monies generated from revenue-producing activities on individual Indian trust lands. While such a failure should not be excused, it was a failure made difficult to remedy because of the phenomenon of Indian land fractionalization. Within another generation, it will be almost impossible to fix unless we change existing law concerning probate and fractionalization.

Fractionalization has created a situation in which hundreds of individual Indians own undivided interests in a single parcel of trust land that may generate only pennies in revenue for each owner. It is not difficult to see what problems that causes. It's nearly impossible to obtain consensus from so many owners to do anything productive or meaningful with the land. It is extremely difficult to manage trust accounts for each of the owners. If the co-owners of such a parcel die without leaving a will, the land continues to fractionate exponentially.

With the passing of a couple more generations, the number of owners of this property will explode, resulting in an administrative catastrophe. The problem has to be addressed now. S. 1721 represents a major step toward slowing and hopefully stopping the continued fractionation of small ownership interests in Indian land. It does so through a variety of measures, including the creation of a uniform Federal probate code and the authorization for tribes to adopt their own probate codes.

The legislation contains numerous incentives for the Department of the Interior, tribes and owners of individual trust lands to consolidate parcels through partition. Most important, the bill encourages Indians to create wills so that they have the maximum freedom to divide their property to their chosen heirs.

I look forward to hearing an analysis of this lengthy and complicated bill from today's witnesses, all of whom had key roles in helping to draft the product before the Committee today.

[The prepared statement of Chairman Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman,  
Committee on Resources**

The bill on which the Committee is receiving testimony today addresses one of the major problems that led to the Indian trust fund lawsuit—the increasing fractionation of Indian land and the lack of sound federal or tribal probate laws.

The Cobell lawsuit arose from the historic failure of past Administrations to properly account for monies generated from revenue-producing activities on individual Indian trust lands. While such a failure should not be excused, it was a failure made difficult to remedy because of the phenomenon of Indian land fractionation. Within another generation, it will be almost impossible to fix unless we change existing law concerning probate and fractionation.

Fractionation has created a situation in which hundreds of individual Indians own undivided interests in a single parcel of trust land that may generate only pennies in revenue for each owner. It's not difficult to see what problems fractionation causes. It's nearly impossible to obtain consensus from so many owners to do anything productive or meaningful with the land. It's extremely difficult to manage trust accounts for each of the owners.

If the co-owners of such a parcel die without leaving a will, the land continues to fractionate exponentially. With the passing of a couple more generations, the number of owners of this property will explode, resulting in an administrative catastrophe. The problem has to be addressed now.

S. 1721 represents a major step toward slowing—and hopefully stopping—the continued fractionation of small ownership interests in Indian land. It does so through a variety of measures, including the creation of a uniform federal probate code and the authorization for tribes to adopt their own probate codes. The legislation contains numerous incentives for the Department of the Interior, tribes, and owners of individual trust lands to consolidate fractionated parcels through partition. Most important, the bill encourages Indians to create wills so that they have the maximum freedom to devise their property to their chosen heirs.

I look forward to hearing an analysis of this lengthy and complicated bill from today's witnesses, all of whom had key roles in drafting the product before the Committee today.

The CHAIRMAN. I'd now like to recognize the Ranking Member Mr. Rahall.

**STATEMENT OF THE HON. NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA**

Mr. RAHALL. Thank you, Mr. Chairman.

Mr. Chairman, to be frank, slogging through the bill pending before us today is a tedious chore. With terms like pendency of probate, afterborn heirs and revocation of owner-managed status, this is a bill only a probate lawyer and the green eyeshade folks can love.

What is not a chore, however, is looking into the faces of Indian country whose very family and tribal traditions depend on how we respond to the land crisis this bill seeks to address. This bill is about the proud Sioux father who has spent a lifetime teaching his children and his grandchildren the importance of a piece of land. He has taught them through stories told to him by his father and to his father by his grandfather, how they all connected to that land. He tells them that soon the land will be theirs to tend and to pass on to their children and their children's children. The bill is about the elderly Navajo woman who has toiled and tended her herd of sheep for years the way she learned from her mother. Now old and tired, she dreams of seeing generations yet to come getting nourishment from that very land. And this bill is about the young Indian couple living in the lush Northwest having recently inherited land. They excitedly plan their future, counting on revenue from land resources they hold and will protect.

I understand this high value of land, where the value is not only commercial, but spiritual. In Appalachia we, too, cherish land passed down through the generations. We also respect that tradition, and along with our families and our Maker, we hold it in the highest regard. For all of these reasons, we have to get it right with this bill. We must ensure Indian lands stay in Indian hands and in trust status.

Congress has made several previous attempts to address the administration and management of Indian allotments, and each endeavor has produced mixed results. We have had parts of two such attempts deemed unconstitutional, and the latest fix is under threat of being the cause of thousands of acres of land coming out of trust status if implemented as the Administration plans. This would be a devastating policy throughout Indian country.

So, Mr. Chairman, I welcome our witnesses here this morning, and I thank them for coming to give us the benefit of their expertise as they are the ones dealing with these problems on a day-to-day basis.

And if I may ask the consent of the Chair, before we hear from our witness, to welcome our newest member of the Resources Committee, Ms. Stephanie Herseth from the State of South Dakota. I do introduce her to our full Committee this morning. South Dakotans, as we all know, were faced with the unfortunate task of replacing their lone Representative to this body, and they rose to the occasion by electing an energetic, bright and highly qualified woman. Congresswoman Herseth is a lawyer by training, who has worked to enrich South Dakota by bringing tribal concerns to the

attention of the South Dakota Public Utilities Commission, advocating with the legal counsel for the elderly and in 2003 serving as the executive director of the South Dakota Farmers Union Federation.

This Committee and the Forest Subcommittee to which she has been appointed will undoubtedly benefit from her perspective on a range of issues, particularly Indian affairs, as 12 percent of her constituents are of Native American descent. And in the words of President John Yellowbird, still of the Oglala Sioux tribe from South Dakota, and I quote, we think she belongs in Congress, and her appointment to this Committee is icing on the cake.

I couldn't have said it any better, and I join with my colleagues in welcoming Stephanie to the Committee. And I know that her addition to the Congress is one in which all of us can benefit. Welcome, Stephanie.

[The prepared statement of Mr. Rahall follows:]

**Statement of The Honorable Nick J. Rahall, II,  
Ranking Democrat, Committee on Resources**

Mr. Chairman. To be frank, slogging through the bill pending before us today is a tedious chore. With terms like "pendency of probate," "after-born heirs," and "revocation of owner-managed status," this is a bill only a probate lawyer and the green-shade folks can love.

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The CHAIRMAN. Congratulations, and welcome to the Committee. I'd like to introduce our first witness, Ross Swimmer, the Special Trustee for American Indians.

Let me take this time to remind all of today's witnesses that under our Committee Rules, oral statements are limited to 5 minutes. Your entire written statement will appear in the record.



Mr. Swimmer, welcome to the Committee. If I could have you stand and raise your right hand.

[Witness sworn.]

The CHAIRMAN. Welcome back to the Committee. It's nice to have you. I have reviewed your testimony, and we are all very anxious to have a chance to discuss this bill further with you. So if you're ready, you can begin.

**STATEMENT OF ROSS SWIMMER, SPECIAL TRUSTEE FOR  
AMERICAN INDIANS, U.S. DEPARTMENT OF THE INTERIOR**

Mr. SWIMMER. Thank you, Mr. Chairman and members of the Committee. I appreciate the opportunity to be here to visit with you today about 1721. I appreciate that our testimony, written testimony, will be accepted for the record.

I'd also like to recognize not only the work of this committee, but the work of the Senate Indian Affairs Committee, and especially Senator Campbell and Senator Inouye, who have led the effort in developing S. 1721, and the staff work that was done in conjunction with meeting many American Indian groups, the California Indian Legal Services, NCAI, the Indian Land Working Group and various tribal leaders, some of whom you'll hear from today. This has certainly been a joint effort of a lot of people that are bringing this bill forward.

I would also like to advise the Committee that I am here as a Special Trustee for American Indians. This issue is very high profile in the trust. It deals with trust assets. Mr. Anderson, the Assistant Secretary, would be here, Mr. Chairman, however, he is also testifying right now before the Senate Indian Affairs Committee on another matter that's very important to the Bureau of Indian Affairs.

I would like to express the Administration's support for S. 1721. In fact, this may be considered one of the most important legislative acts of this congressional session. It is important not only to the Administration in solving some of the very difficult problems involving fractionation in Indian country, but it's important to Indian country as a whole because of what has happened over the century, the last century, and this century, in fact, as fractionation continues to plague Indian country.

As you mentioned, it's not the first time it's been before Congress. It actually was raised in the 1920s, the 1930s, 1970s, and actually dealt with for the first time legislatively in the 1980s. And I think we all know what happened then. There was an effort to deal with the very small fractionated interests, the 2 percent or less of interests that were owned by Indian individuals, and that solution was to escheat those interests to the resistive tribe over which jurisdiction was being exercised.

Unfortunately, the Supreme Court did reverse the legislative mandate and held that it was unconstitutional, that it was an actual taking of property without compensation, and as a result of that effort, and the Court's subsequent ruling, of course, things were made even worse because we now have thousands of interests that were escheated to tribes that have to be dealt with and subsequent probates that have happened, even to the owners of those interests back in the '80s.

S. 1721 is important for several reasons. There are several portions of the act. One is the Uniform Probate Code. The Uniform Probate Code will allow the adjudicators, the administrative law judges and attorney decisionmakers within the Bureau of Indian Affairs to work within a single probate code rather than having to deal with multiple State codes. It is not unusual now for an Indian individual to pass away and leave interests, as many as 10 or more interests, all of which may be located in different States, and all of which would have to be probated under those State laws. This uniform code, we believe, will allow a much more uniform probate of those estates and administration of the estates, and make the probate much more efficient.

We believe the bill will protect trust land status. It defines highly fractionated land. There is a single heir rule for inheriting of highly fractionated land. It makes the land acquisition program permanent, what we call the Indian Land Consolidation Program. And it creates a partitioning authority to support returning land to a single Indian or tribal owner. It also provides for a pilot program for family trusts to be created and allows for self-directed trusts by consenting owners who want more responsibility for the management of their property and less oversight by the Secretary.

Our written statement contains examples of several problems created by the fractionation of Indian ownership. I would like to add that although we have given examples in the written testimony, these are not exceptions. The examples you see in the written testimony are more the rule than the exception. There are millions of acres of land today that are not benefiting Indian owners because of highly fractionated ownership.

I would also like to suggest to the Committee that whether this be bill through an amendment or subsequent legislation that the Committee may consider, that there are two issues remaining that do need to be dealt with. One is what we call the Youpee issue, which I mentioned earlier, the overturning of the law by the Supreme Court, which in essence said that the escheat of property less than 2 percent was unconstitutional. We need to have that defined that it is a taking and a legislation that would authorize a payment for those interests.

We also have an issue with whereabouts unknown. Over the years, many, many individual Indian people are no longer known to the Department as far as their address is concerned. They have been—we have attempted to contact them many, many times and get—have no success in doing so. We have as many as 40-, 45,000, I believe, last count of whereabouts unknown that own this property, and it would be impossible to purchase their interest if we attempted because we can't locate them. We do need to have some relief in the form of what most States have, a uniform unclaimed property act of some sort that would allow these interests then to be disposed of or acquired by the Secretary for the benefit of the tribe.

With that, again, I would like to say, too, that the Administration is very supportive of this bill, and once again, thank those who participated in the development of it and be happy to answer any questions you might have.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Swimmer follows:]

**Statement of Ross O. Swimmer, Special Trustee For American Indians,  
U.S. Department of the Interior**

Mr. Chairman and Members of the Committee, I am pleased to be here today to provide the Administration's views on S. 1721, a bill to amend the Indian Land Consolidation Act (ILCA) to improve provisions relating to the probate of trust and restricted land. The Department would like to thank the Congress for its continued efforts to address this extremely important issue. This bill will provide the Department with valuable tools to help expedite the probate process through enactment of a uniform probate code, as well as provisions to help stop the exponential growth of fractionated interests. The Department strongly supports S. 1721.

Secretary Norton has spent a major portion of her time as Secretary on the many issues surrounding reform of the Indian trust. Among the most important aspects of trust reform are the need to reform our Indian probate system and the need to stem the growing fractionation of individually owned Indian lands. Our current probate system is costly, cumbersome, and confusing. It contributes to fractionation rather than helping stem it. Fractionation of Indian lands is a continually growing problem. This Administration supports the swift enactment of legal reforms to Indian probate, and of measures aimed at reconsolidating the Indian land base and returning Indian lands to tribal ownership. As we have stated on numerous occasions, this may be our last opportunity to reform probate before the current system collapses.

S. 1721 provides this reform. We at Interior worked extensively with the Senate Committee on Indian Affairs during its development and consideration of this bill. We believe you have a sound piece of legislation before you today that will benefit Indians, their heirs, and Indian Tribes.

This legislation is one of the pieces necessary for true trust reform. Not only will it improve the probate process, but it will also allow the Department and Indian Country to consolidate Indian land ownership in order to restore full economic viability to Indian assets.

S. 1721 provides a uniform probate code for Indian Country, adding consistency and clarity to the probate process. In addition, S. 1721 provides valuable tools for attacking the fractionation problem, by defining highly fractionated lands, providing for a single heir rule intestate, allowing greater flexibility to consolidate and purchase interests during probate, making Interior's Land Acquisition Pilot Program permanent, and creating partition authority where the tribe or a current interest owner can request a sale of the parcel to make it whole with one individual.

For nearly one hundred years, the fractionation problem has grown. We are now at the point where, absent serious corrective action, millions of acres of land will be owned in such small ownership interests that no individual owner will derive any meaningful value from that ownership. The ownership of many disparate, uneconomic, small interests benefits no one in Indian Country. It creates an administrative burden that drains resources away from other beneficial Indian programs. S. 1721 will help slow the growth of fractionated interests and provide necessary tools that we can build upon in the future to resolve this problem.

**BACKGROUND**

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 up to approximately four million owner interests in 10 million acres of individually owned trust lands, a situation the magnitude of which makes management of trust assets extremely difficult and costly. These interests could expand dramatically by the year 2030 unless an aggressive approach to fractionation is taken. There are now single pieces of property with ownership interests that are less than 0.0000001 percent or 1/9 millionth of the whole interest, which has an estimated value of .004 cent.

The Department is involved in the management of 100,000 leases for individual Indians and tribes on trust land that encompasses approximately 56 million acres. Leasing, use permits, sale revenues, and interest of approximately \$195 million was collected in FY 2003 for approximately 240,000 individual Indian money (IIM) accounts, and about \$375 million was collected in FY 2003 for approximately 1,400 tribal accounts. In addition, the trust currently manages approximately \$2.8 billion in tribal funds and \$400 million in individual Indian funds.

There are approximately 240,000 open IIM accounts, the majority of which have balances under \$100 and annual throughput of less than \$1,000. Interior maintains over 20,000 accounts with a balance between one cent and one dollar, and no activity for the previous 18 months. The total sum included in these accounts is about \$5,700, for an average balance of .30 cents. Nonetheless, the Department has an equal responsibility to manage each account and the real property associated with it, no matter how small and regardless of account balance. Obviously, no one benefits from such expenditures.

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

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

#### **PERSISTENT PROBLEM**

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

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

Similar observations were made in 1977 when the American Indian Policy Review Commission reported to Congress that "although there has been some improvement, much of Indian land is unusable because of fractionated ownership of trust allotments" and that "more than 10 million acres of Indian land are burdened by this bizarre pattern of ownership." The Commission reiterated the need to consolidate and acquire fractionated interests and suggested in this report several recommendations on how to do so. Many of the observations and objectives made in 1938 and 1977 are the same today.

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

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

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

titled to \$.000418. The administrative costs of handling this tract are estimated by the BIA at \$17,560 annually.

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

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

#### CONGRESSIONAL RESPONSE

Congress recognized 20 years ago the need to take firm action to resolve the problem of small uneconomic interests in Indian land. In 1983 Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA). The Act authorized the buying, selling and trading of fractional interests and for the escheat to the tribes of land ownership interests of less than two percent. A lawsuit challenging the constitutionality of ILCA was filed shortly after its passage. While the lawsuit was pending Congress addressed concerns with ILCA expressed by Indian tribes and individual Indian owners by passing amendments to ILCA in 1984.

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

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

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

Some of the land related provisions are currently in effect, such as the pilot program to acquire fractionated interests. In fact, the BIA has conducted a pilot fractionated interest purchase program in the Midwest Region since 1999. As of March 31, 2004 the Department has purchased 78,321 individual interests equal to approximately 49,155 acres. The Department is in the process of expanding this successful program nationwide. We also plan, where appropriate and to the extent feasible, to enter into agreements with Tribes or tribal organizations and private entities to carry out aspects of the land acquisition program. The 2005 budget request also includes an unprecedented amount of money for this program and we are pleased that S. 1721 would make it permanent. However, it is important to note

that even with the success of this program, during this period the number of fractionated interest grew even larger.

The 2000 amendments have begun enhancing opportunities for economic development by providing for negotiated agreement, standardizing, and in some cases relaxing the owner consent requirements. This has streamlined the leasing process for land owners to enter into business and mineral leases. While many of the land related provisions have proven to be successful, many other provisions, especially the probate provision, have proven to be complicated and difficult to implement.

#### *S. 1721*

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

Unfortunately, the 2000 amendments have not solved the issue, in part due to ambiguities in the statute and in part due to the possibility that full implementation could result in the loss of trust status for a significant part of the Indian land base. The 2000 amendments have proven to be complicated and difficult to implement. In addition, certain provisions were left to be dealt with in an anticipated package of amendments. For instance, the 2000 amendments do not contain a federal code of intestate succession and certain lands in California and Alaska were exempted from the probate provisions. At the same time, fractionation continues to be a pervasive problem in Indian Country.

We are pleased that S. 1721 considers the above issues by providing for a uniform probate code and strengthening the ability of and adding greater flexibility to co-heirs, co-owners, and the tribe to purchase interests, renounce interests and enter into consolidation agreements during probate. The Department is also pleased that S. 1721 would provide for the authority to partition highly fractionated land.

#### *Uniform Probate Code*

S. 1721 would provide a uniform probate code for Indians while still allowing tribes to set up their own codes for their members. As it currently stands, during probate the Department has to apply the state law where the trust asset is located. This has lead to the Department having to apply approximately 33 different state laws when probating individual trust estates. In many cases, interests in an estate are located in multiple states resulting in the application of numerous state laws being applied for one probate.

The application of 33 different state laws has lead to a lack of consistency and predictability in administering probates in Indian Country. A uniform probate code will allow the entire estate of a decedent to be probated under one set of laws no matter where the real property is located. This will add clarity, consistency and predictability to the probate process.

We are also pleased that S. 1721 would allow an individual to devise his property to anyone. Previous versions of ILCA limited the scope of available heirs in devising one's property. S. 1721 would allow the property to be devised by will to anyone; the only caveat would be whether the interest would be inherited in trust or restricted status or in fee. S. 1721 would also provide for a single heir rule intestate. Under the single heir rule, when interests are not being devised in testate (by a will), an interest of less than 5% in a parcel would be inherited intestate by the oldest in that class (the oldest child, the oldest grandchild, etc.). Overtime this will help consolidate interests. Extremely small interests will be prevented from further fractionating which in turn will help slow the growth of fractionated interests.

S. 1721 would also strengthen the ability of and add greater flexibility to co-heirs, co-owners, and the tribe to purchase interests, renounce interests and enter into consolidation agreements during probate. Eligible heirs or devisees, co-owners, and the tribe with jurisdiction over the parcel would be allowed to purchase interests during probate prior to the distribution of the estate with the proceeds of the sale being distributed to the heir, devisee, or spouse whose interest was sold. Heirs would also be given the ability to renounce or disclaim their interests and enter into consolidation agreements during probate. These important tools will help enable individuals to consolidate their interests and prevent the continual fracturing of estates.

#### *Partition*

S. 1721 would authorize the Department to conduct a partition proceeding of highly fractionated land. Highly fractionated lands are defined under S. 1721 as those

lands having 50 to 100 owners with no co-owner owning more than 10% undivided interest or any trust or restricted land with more than 100 co-owners.

Partition under S. 1721 is in essence a forced sale, which could only be brought upon the request of the tribe with jurisdiction or any person owning an undivided interest in the parcel of land. The applicant would be required to obtain consent for the sale from the tribe with jurisdiction over the parcel, an owner who for the three years preceding the partition proceeding had maintained a residence or business on the parcel, or from at least 50 percent of the undivided interest owners if any one owner's undivided interest has a value greater than \$1,500.

The Secretary, after receiving a payment or bond from the petitioner, would begin the partition process. The Secretary would provide notice to the other landowners, conduct an appraisal, allow the owners the right to comment on or object to the proposed partition and the appraisal as well as appeal, and conduct a sale. The tribe with jurisdiction over the parcel or any eligible bidder would be allowed to purchase the parcel.

We are hopeful that tribes and individual interest owners will take advantage of this valuable consolidation tool. It is our hope that these highly fractionated parcels will be purchased so they can be put to greater economic and viable use. In addition, we look forward to working with the Committee to bring the language creating a new loan program into compliance with Federal credit standards.

#### **REMAINING ISSUES**

We do request that prior to passing this legislation that Congress consider amending S. 1721 to provide the Department with the authority to dispose of unclaimed property and provide for a technical correction to address the Supreme Court decision in *Babbitt v. Youpee*, 519 U.S. 234 (1997) and the District Court case decision in *DuMarce v. Norton*, Civ. 02-1026, 02-1040, 02-1041 (D.S.D.).

#### *Unclaimed Property*

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

#### *Youpee and Sisseton-Wahpeton*

We also request a provision be added to S. 1721 that would provide a technical correction to address the decisions in *Youpee v. Babbitt* and *DuMarce v. Norton*. As mentioned above, the Supreme Court in *Youpee* held the escheat provision of ILCA as unconstitutional. In *DuMarce v. Norton*, the District Court for the District of South Dakota found unconstitutional a statute under which any interest of less than two and a half acres would automatically escheat to the Sisseton Wahpeton Sioux Tribe. As a result of these two decisions, the Department is faced with having to re-vest interests that escheated under both statutes back to the rightful heir. We request that Congress add a provision to S. 1721 declaring that any interest that escheated pursuant to these Acts be vested in the tribe to which they escheated unless they have been re-vested in the name of the heirs of the allottee by the Secretary since the escheatment. The provision should provide that the escheat of those interests to the tribes involved a taking by the United States and should provide compensation to the heirs of those escheated interests.

#### **CONCLUSION**

The Department has been heavily engaged on working toward a constructive solution to the fractionation and probate issues. Over the last year the Department, congressional staff, the Indian Land Working Group, and the National Congress of American Indians have worked extensively on developing ideas and legislative language to constructively address probate reform and land consolidation. We are extremely pleased that many of those idea and suggestions are reflected in this bill.

We thank the Congress for taking the lead on these important issues for Indian people and trust reform. S. 1721 addresses fractionation in a meaningful way and provides valuable tools for the Department to build upon. This concludes my statement. I will be happy to answer any questions you may have.

The CHAIRMAN. You suggest a couple of different amendments to be made to the legislation. How critical do you believe those amendments are to having legislation enacted that would work?

Mr. SWIMMER. If there would be anything that would delay the implementation of the legislation as it's written in 1721, we would not suggest doing anything. If it could be amended to include those two issues, that would be fine. We think it is essential that this legislation be passed if at all possible. It is possible that these other two issues could be addressed in separate legislation as well.

The CHAIRMAN. One of my biggest concerns is dealing with private property rights, any time we get into an issue like this, I have concerns about how the individual property rights will be treated. In your estimation, what in this legislation guarantees the protection of those individual rights of the individual tribe members, individual Indians?

Mr. SWIMMER. Well, I think throughout the bill there are provisions that assure that Indian individuals have the right to deal with their own property; whether it's through inheritance, in the probate process, even intestate situations, there are provisions for property being given to the appropriate heirs.

In the purchase option in the Indian Land Consolidation Act, again, it is voluntary, and there—except in the partition provision, which only applies involuntarily to interests that are under 5 percent, I don't know of any other provision in the Act that would—could be considered, frankly, a taking of any kind. I think every provision, and including partition, because it's not—it doesn't even provide the degree of authority that you would normally find every day in State law for non-Indians. The forced sale that's available in the partition section would only apply to interests that are less than 5 percent. And then it gives options to the people there to purchase that property as well.

So there is no sense of escheatment or anything like that in this bill, so I think throughout the bill that there are adequate provisions for protecting individual property interests.

The CHAIRMAN. Just to follow that up, when you talked about an unclaimed property statute of some kind, would any lands or interests in lands that are taken under that provision go back to the tribe or other members of that tribe? Would we ensure that the lands stay there?

Mr. SWIMMER. Yes.

The CHAIRMAN. So that would be written into the statute?

Mr. SWIMMER. What we have proposed to various working groups in the Indian community as far as unclaimed property, and what I believe was proposed at one time, or at least discussed at NCAI, was a provision whereby property that we could not locate or identify ownership would be converted from real property into cash for the appraised value. The property itself would then be transferred to the tribe, the respective tribe that has the jurisdiction. The cash would be put in an account available to the individual if and when



that individual or their heirs came to claim the value of the land. It would allow some certainty, however, in land titles that we don't have now, because, as I said, these 45,000 people could potentially own 450,000 interests, and those interests will forever be unavailable or unusable, frankly, to the tribes or the individual themselves because their whereabouts are unknown.

The CHAIRMAN. All right. Thank you.

Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

There is a provision that makes the Department's fractional interest buy-back initiative, the BIA Indian Land Consolidation Program, a permanent initiative. I'm wondering, how productive do you feel the pilot program has been? And how would the enactment of the pending legislation add to its effectiveness?

Mr. SWIMMER. The pilot program has operated for a couple of years in the Great Lakes area. It has been pretty successful. In fact, there, in fact, has not been a lack of willing sellers. I believe nearly 40 percent of the purchases that have been made from willing sellers were made from people who did not even realize they owned an interest in the land. These were people who basically had abandoned the property. They may have inherited and may realize that their great-great grandfather had an allotment, but didn't realize that that had passed down over the years, and they had some minor interest in a piece of property in the Great Lakes area.

So what we're finding, though, is that as we work with tribes and let people know that we are engaged in a program to purchase these fractionated interests, that we have very, very strong response to that. We have paid, offered the appraised value, and it's been a very good program. I believe now we have acquired over some—I believe it's close to 70,000 interests representing several thousand acres, if you converted it to acreage. About 80 percent of those interests, I believe, have been below 2 percent ownership interest.

But as I said, it's not uncommon that when we do purchase from an individual, we find that they own anywhere from 8 to 10 interests maybe scattered all over the United States because of inheritance. We'll find people in the Great Lakes area that are now living in someplace east of the Mississippi. They may own land in South Dakota, Arizona, Oklahoma, Washington and not even realize it.

And so we are having good success in the pilot, and we believe that as we are able to get appropriations to continue that program, that it will happen elsewhere.

Now, what it allows us to do, of course, is consolidate those interests within the tribe. It makes those interests much easier to manage, and it also eventually avoids a probate cost of the people that are willing to sell their fractionated interest.

Mr. RAHALL. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Hayworth.

Mr. HAYWORTH. Mr. Chairman, I thank you for the recognition. I would like to thank Mr. Swimmer and the other panelists we'll hear from in just a few minutes.

I have no questions, just simply a sentiment to welcome the newest member of our committee, the lady from South Dakota, and I'd yield back my time.

The CHAIRMAN. Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. And I also want to welcome our new Congresswoman Stephanie Herseth for being up here. This is great to see you here today.

I just wanted to thank the Chairman for holding the hearing and mention that again, which we all know, that the Committee has taken an active role in trying to help resolve the issue of trust reform. And I think along with the issue of trust accounting, land fractionation lies at the heart of trust reform, and I think if we're able to find a solution to put an end to land fractionation, we will move one step closer to solving the greater issue of trust reform. So that's why I think today is very important.

And I also wanted to note that I think the way this issue has been approached is the way that we should be approaching trust reform in general. In other words, it seems clear that Indian country, Congress and the Administration have been working together for many years to find a solution to land fractionation, and it's with this kind of cooperative spirit that I think we could approach the issue of trust reform accounting in general. That's why I think this is so important.

But I wanted to ask Mr. Swimmer, I had some general questions about the Administration's policy when it comes to land fractionation. According to the Office of Special Trustee, for the current fiscal year the BIA and the OST are estimated to spend about 220 million on activities related to fractionation. These costs are expected to grow sixfold in 20 years to almost 1.2 billion annually. You know, I have mentioned my concern about the costs dealing with trust reform in general, and I have always—I will repeat again today that I think such funds, you know, could be used for other essential Indian programs. So I always worry about the fact that we are spending them on this.

But Mr. Rahall, our Ranking Member, went into the whole issue of the pilot program, and, of course, one of the bills before us would make permanent the pilot program. And you talked a little bit, Mr. Swimmer about, you know, whether the pilot program was working in response to Mr. Rahall. But if you could be more specific and comment on the number of interests that you have acquired since the inception of the pilot program, and how much savings that has resulted in, and how much savings are expected from the expansion the program, because there—even though you've acquired a certain amount of interest, you know, there's evidence that those that remain, you know, continue to be fractionated at even a greater, you know, amount. So if you could be more specific about the number of interests and the savings and how much you expect to be saved from the expansion if it's made permanent.

Mr. SWIMMER. The pilot program, as I understand it—and the program is being operated by the Bureau of Indian Affairs out of the Great Lakes region and agency. It is my understanding that they have acquired between 70- and 80,000 interests. Those—and I believe that the amount of money spent approaches the \$30 million over the last, say, 2-1/2 years that those interests have been

acquired. In a number of tracts, and that would be your original allotments, say, an 80-acre tract or 160-acre tract, that's where those interests are, it may be 1,000 interests, for instance, in one tract. And many of those tracts, I don't have the exact percentage, I think it's probably around 35 to 40 percent now, they have acquired a majority interest on behalf of the tribe. And under the current legislation, that does allow the tribe to acquire the balance of those interests through some form of condemnation-type proceeding. They can pursue the other half——

Mr. PALLONE. And if I could—I don't want to cut you off, but I wanted to also ask about the compacts, because I understand that certain tribes weren't able to participate in the pilot program, specifically compact tribes such as the Confederated Salish and others, and I was wondering if there were going to be such limitations on the national program. Would you still have those same exclusions?

Mr. SWIMMER. I am not aware of those exclusions. In fact, I was advised by the lead person in the Bureau that Salish/Kootenai, who is a compacted tribe, was given a sum of money from the last appropriations, from the '04 appropriation, to pursue its fractionated program that it already has under way that itself, the tribe itself, had begun several years ago. So unless that has changed in the last few weeks, I was told that they were one of the tribes.

Now, the way I understand it's being operated now is that it was expanded from reservation to reservation. It started in the Great Lakes. It was then expanded into the Rosebud Reservation, and that it also, I believe, is now at Pima in Arizona. The idea was to try to go to the highly fractionated reservations, and I believe Crow is one that is on the list now.

But we also, in addition to that, in order to achieve the cost savings that we've talked about, are trying to target those people who have accounts that have very small sums of money. For instance, I'd mentioned before at an earlier hearing we have 20,000 account holders who have an average balance of less than \$1. Those, each one of those, even though their account balance and their land interest may amount to less than \$1 in value, we may spend 3- to \$4,000 to probate those estates.

That's where I would expect the greatest savings to come in, the administration of the property interest. The actual leasing of it, is not that big a burden. It's going to be leased to a single or a group of lessees. The ownership, though, the expense of the ownership comes in trying to manage each of those accounts. If we have 1,000 owners, we have to set up 1,000 accounts. We have to collect the money. And oftentimes, in a case like I'm discussing, it may be a \$500-a-year lease. We divide that 1,000 different ways, deposit it, supposedly collect interest on it if it's more than a penny, and then track those accounts through probate. So our savings really comes a little bit throughout the system.

To quantify those savings today, I just can't do that. I can't really tell you other than if we purchase 100 percent of the owners' property, that we are going to save in the probate. As I said, an average cost of probate's around 3,000 plus dollars. We are going to save in account maintenance and the setup of the account and tracking those moneys that may come in on that account, and that could be \$100, \$200 a year. And we will save in the administration of the

land because we'll be talking about one owner, the tribe, who would then be able to lease the property without having to send notices out to 1,000 people that it's going to be leased, or 100 people or whatever.

So the savings are throughout the system. To give you a number, it would just have to be a guess at this point. But the savings are real ones. We've acquired all of the interests that an individual might have that are fractionated and that may be in many different jurisdictions, as I mentioned.

Mr. PALLONE. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman's time has expired.

Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman.

Mr. Swimmer, I don't know if you regularly talk to Ms. Norton. This question really should be directed at that, but if you have regular communication, my concern is that in February 2002, the Interior Department giving strong support, Congress passed and the President signed into law the mineral consolidation bill for the Pueblo of Acoma, P.L. 107-138. It provides that the Interior shall acquire nontravel mineral rights interest at the Pueblo of Acoma and consolidate ownership of these interests in trust for Acoma. It's pretty distressing to learn that 3 years after this, that after the completing of that bill, the—and the deadline for transferring those mineral rights, that the MMS is indicating an unwillingness, not just they haven't done, but an unwillingness, to carry out the law. And so my question is what do we do, and how are we going to get about it, and when can I get an answer back?

Mr. SWIMMER. I apologize. I am not familiar with that issue. I'll take the message back and get a response to you as soon as possible.

Mr. PEARCE. OK. And if the response is that MMS is still unwilling to do it, we would like explanations of why they feel like they've got the option to not follow a public law that's been passed and signed into law. And if they are going to do it, are they going to comply with the deadlines in the bill? So if we could get addressing on that. It's a pretty important matter. Acoma is one of the pueblos in my district that is trying to hard to make it on their own. They have got several avenues working, and when they see something that's passed into law, and they are just met with the same stonewall as before, it's awkward and it's—it really is not proper.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Udall.

Mr. UDALL OF NEW MEXICO. I also would like to welcome our newest member to the Committee, Stephanie Herseth, and yield any time to her if she would like to proceed with questioning.

Ms. HERSETH. Thank you, Congressman Udall. I did have one question.

You raised the issue, the Youpee issue, and the issue that came up as well as in the DeMars case which involved the Sisseton-Wahpeton Sioux tribe in South Dakota, and I am just wondering are there any other parts of those holdings in those cases or any other Supreme Court—relevant Supreme Court cases that you feel

the bill doesn't adequately address as you provide here, suggesting an—in addition, a provision that addresses the escheat issue?

Mr. SWIMMER. There's nothing else in the bill that deals directly with those two issues. The bill, I believe, does address the root cause of those two issues by assuring that the individual property rights are protected, as well as if there is any purchase, that it is paid for.

The escheat provisions that were in the 1983 and '84 legislation were—they were the ones that were overturned by the Court. There was some consideration that the escheat provisions might be legal if they applied only to intestacy instead of not allowing an individual to write a will, for instance. But this bill doesn't acknowledge that, and it requires that payment be made. And I think that the 5 percent rule for highly fractionated heirship and allowing only a single heir to inherit is the closest that one might come to it, that only applies in intestacy. But I also believe that we're well within the Supreme Court's guidelines on that in this particular bill.

The Youpee and the DeMars cases, though, present us a unique issue, and it is how to deal with subsequently, because now we have those roughly 60,000 interests that were involved in Youpee and Moore and Demars, and about 5- or 6,000 owners, and we need to compensate those folks. We've already transferred in many instances the property deeds to the tribe. We'd rather not transfer them back. What we'd like to do is compensate the people for the—what the Court has determined to be a taking, and we need congressional authority to do that.

Ms. HERSETH. Thank you. That's all I have.

The CHAIRMAN. The gentleman yields back his time.

Mr. Renzi.

Mr. RENZI. Thank you, Mr. Chairman.

Mr. Swimmer, thank you so much for coming by today. I had the opportunity to work with my colleague from Utah Mr. Matheson, and we were able to do a field hearing on Native American housing issues up in the Navajo Nation recently. And in the course of hearing some testimony, we learned that in dealing with trust lands and in dealing with the ability of trying to close escrow on trust lands, that the BIA has a 113-year backlog. So while we're dealing with the reform of fractionalization here, and the ability to have a clear pathway toward ownership and eventually economic use, whether it be residential or commercial, we still, once we have the fractionalization problem or issue resolved hopefully through this legislation, are going to have to then deal with this backlog. You have got individuals who are Native Americans who are trying to buy homes on trust land, and who are waiting sometimes over 2 years for those closings to occur.

Now, I realize you've done a great job, and we've had success in closing and gaining economic use out of fee simple lands, but on trust lands we have got this 113-year backlog. Do you think we should deal with that in this legislation, or is there an ability to come back and look at some sort of reform as it relates to privatization or contracting out the backlog so that we can reduce that 2-1/2-year wait that some of our Native Americans are having to deal with, even if they now gain ownership or a path to ownership, or

if they've gained the ability of the banks to provide them with a mortgage?

Mr. SWIMMER. I think when you speak of backlog, you're referring to the title system that is slow, and being able to get title reports, title—what we call title status reports so that a mortgage company knows who owns a property and can put the mortgages on it, or that HUD can deal with it.

This has been a problem that, in fact, has plagued the Bureau and Indian owners for years. The problem is caused by an antiquated title system that goes back 30, 35 years. That title system is currently, as we speak, under replacement. There's an investment, somewhere between 20 and 30 million, I understand that, that is being put into a new title system that is now being brought up in every title agency. We've got about eight offices where they maintain title. It will completely—at least our expectation is that it'll revolutionize where we are in being able to issue title reports.

I am told by the Bureau that that system is to be fully implemented and that backlog you talked about substantially reduced by February or March of next year. They started this implementation in December of '03. We were given a 15-month period of time to get it fully installed across Indian country and to bring the backlog current. And that backlog means getting all of the title documents recorded that are waiting, literally stacks of documents waiting to be recorded so that accurate title status reports can be given. And I have tracked that myself, and I do believe that they are on target for making that deadline.

Mr. RENZI. Now, this is the new software that was purchased. You're talking about the new technology and software?

Mr. SWIMMER. Yes.

Mr. RENZI. Well, I look forward to following up then maybe working with you on some oversight as to what kind of successes and accomplishments you come through with. We have got to get down the 2-1/2-year wait.

Mr. SWIMMER. Oh, absolutely.

Mr. RENZI. Thank you sir. Appreciate it.

Thank you, Mr. Chairman.

The CHAIRMAN. Mrs. Christensen.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman. I, too, want to welcome our new colleague to the Committee.

I just have one question. Just looking through some of the testimony that will follow yours, Mr. Swimmer, there was a—the Department of the Interior was allowed to provide input into the bill after the stated deadline for submission. And because of that, the point of view that they put forward, as I understand it, wasn't able to be addressed by the work group. Could you—and also created an unfair advantage for Interior versus everyone else who had to abide by a deadline. Would you respond to that, because I won't have a chance to ask you after the testimony is given?

Mr. SWIMMER. Sure. I am not aware of all of the time lines as far as the bill is concerned. It started—actually there was a draft of a bill nearly 2 years ago, and Interior was not able to support that particular draft from the Senate committee. It then went back, and a lot of folks in Indian country did get involved in it, and we were very pleased at that. We looked at a draft that came out. We

made comment on it, sent it back out, and I would suggest that that probably occurred as many as three to five times. We met, and I personally met, and our congressional affairs folks met with the Senate committee, off and on, during those times, and I personally was not aware of any particular deadlines. In fact, I guess we worked on the bill and sent comments, oh, probably as late as, you know, a few weeks, maybe before it was introduced or marked up. I think it might have gone through a couple of markups even.

My, and certainly the Administration's, effort was to be supportive and to try to get a bill that would address the problems that we face in probate land consolidation. And regardless of, you know, when comments came in, I would hope that everyone felt comfortable in submitting their comments whenever they wanted to. I would not want to, you know, have a deadline that said, well, if there's something that we really feel is a problem here, that we shouldn't comment on it.

So I just—I'm just not aware that that occurred. And I haven't read the testimony, so if there are issues that are in there that someone has concern with, we'd be happy to talk about that. But I would say that our suggestions in the legislation were fairly minor. We were very pleased with the progress as we had monitored the legislation and reviewed various drafts, and we sent our comments out to the working groups from time to time. So, you know, I just—we feel like it's—it is a good bill and will help us meet these issues.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman. And I also join with my colleagues in welcoming our new colleague to the Committee. Welcome.

Mr. Chairman, if there's no objection, I'd like to submit a statement on the discussion today and fractionated land in particular as it applies to the Gila River Indian community, which is part of my district, and with that, I yield back.

The CHAIRMAN. Mr. Udall.

Mr. UDALL OF COLORADO. Mr. Chairman, I want to welcome our new colleague from South Dakota, and I want to thank Mr. Swimmer for being here today.

At this time I don't have any additional questions, but I would like to reserve the right to direct written questions to the Department of the Interior as we have a further chance to look over the legislation.

Mr. UDALL OF COLORADO. If I can add one other comment, I would like to thank you for continuing to pursue this. And I hope this is maybe a small step in the right direction.

With that, Mr. Chairman, I'd yield back any time I have.

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. And I, too, would like to offer my personal welcome to our new distinguished member of our committee here from the great State of South Dakota, Ms. Herseth, and look forward to working with her in the coming weeks and months in our committee.

I also want to offer my personal welcome to Mr. Swimmer and my apologies for not being here earlier to have heard your

testimony, but I have gone through some of the things that are stated in your statement. I see a very close parallel of the problems that we face not only with our Indian tribes. I say a sense of parallel on this issue, I notice that it's been over 70 years. This is not a new issue. This problem has been infesting the Indian tribes for how many years, and just now at this point we've come to—certainly want to offer my commendation to the Senator from Colorado, the Chairman of the Indian Affairs Committee in the Senate, my good friend Senator Campbell for this initiative, and I take it that that bill has passed the Senate. It has the support of the Administration on a bipartisan basis; am I correct on this, Mr. Swimmer?

Mr. SWIMMER. Yes.

Mr. FALEOMAVAEGA. OK. I wanted to ask, does this also have the support of the Indian Nations around the country?

Mr. SWIMMER. As far as I know, it does. I believe that there's been quite a bit of work done by various groups from Indian country on the bill, and, of course, you're going to hear from some of those people here soon.

Mr. FALEOMAVAEGA. Well, the bill is over 100 pages, and I'm not—certainly not an expert in all these legalese terms and referrals and all this and that. I make a reference to say this is a parallel issue that I've attempted in the years past on another problem that has been bugging me for the times, the 16 years that I have served on this committee, the regulations that were established by the Department to do the procedures of giving Federal recognition to tribes that apply. And, you know, some of these tribes have taken 15 years. They can't even afford the expense of paying attorneys and so-called experts in making them so-called qualified for the seven criteria. And unfortunately, when introducing the bills, I have not received any support from the Administration.

The bottom line is you mentioned in your statement here that the turnaround aspects of this proposed bill to amend the law at least give the Indian people about a 2-year period to give some sense of results or substance when they make the probates and all this. And I want to mention to Mr. Swimmer that it takes 15 years for some tribes to even to get the advice and assistance of the Federal Recognition Division of the Department of the Interior to do this. And I realize and this is not the issue, but I'm saying I'm facing a parallel issue where this has taken so long, and I certainly, Mr. Chairman, I sincerely hope that if this has the bipartisan support of the other body and certainly with the Administration, I'm leaning very strongly toward supporting this legislation. And, again, I want to thank Mr. Swimmer for being here, and thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Are there any further questions of the witness?

Well, Mr. Swimmer, thank you very much. Obviously, this is a complicated issue, and there may be further questions that Members have that they would like to submit to the Administration in writing, and if you could answer those in writing so that they can be included in the hearing record.

Mr. SWIMMER. Thank you.

The CHAIRMAN. Thank you very much for being here.



Mr. SWIMMER. Thank you.

The CHAIRMAN. Panel two is up next, consisting of The Honorable Charles Colombe, president of the Rosebud Sioux Tribe of South Dakota; and The Honorable Maurice Lyons, Chairman of the Morongo Band of Mission Indians.

Mr. EMERY. Mr. Chairman, the Rosebud Sioux Tribe sent me here to represent Charles Colombe. I'm tribal attorney for the Rosebud Tribe. May I sit with my client?

The CHAIRMAN. Yes. You're more than welcome to sit with him. The president will be testifying, but you're more than welcome to sit with him. Please identify yourself for the record.

Mr. EMERY. Mr. Chairman, members of the Committee, for the record my name is Steven Emery, and I'm tribal attorney for the Rosebud Sioux Tribe of South Dakota.

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

[Witnesses sworn.]

The CHAIRMAN. Welcome to the Committee. It's nice to see both you again. In fact, it's nice to see all three of you again.

Before we begin, I would like to recognize Congresswoman Herseth to introduce her constituent.

Ms. HERSETH. Thank you, Mr. Chairman. Let me just first say that I'm honored to be serving on this distinguished panel. This is my first Resources Committee hearing, and I look forward to working with the Chairman, with my colleagues, Ranking Member Rahall, and working together on significant issues that affect so many people in South Dakota.

As Congressman Rahall noted, Native Americans make up the single largest minority population in my State, and this committee has jurisdiction over issues of paramount importance to Native peoples in South Dakota, from Indian health care to trust reform to law enforcement issues. South Dakota tribal leaders will have my ear and will have a voice on these issues in this body.

Regarding the issue at hand, I would like to commend you, Mr. Chairman, and others for bringing this important issue up for a hearing today, and I would like to welcome my fellow South Dakotans, President Charlie Colombe as well as Steven Emery. And Charlie is the president of the Rosebud Sioux Tribe in south central South Dakota, and he is a recognized expert on the areas of tribal probate and land fractionation issues.

Ms. HERSETH. I thank him for traveling to Washington for this hearing, and commend his testimony to all of my colleagues on the Committee. We will certainly benefit from his depth of knowledge and experience on this important matter.

Thank you, Mr. Chairman. Thank you, Charlie.

The CHAIRMAN. Thank you.

Mr. Colombe, if you are ready, you can begin.

**STATEMENT OF THE HON. CHARLES C. COLOMBE, PRESIDENT,  
ROSEBUD SIOUX TRIBE, ROSEBUD, SOUTH DAKOTA**

Mr. COLOMBE. Thank you, Mr. Chairman. Chairman Pombo, Committee, I really appreciate the opportunity to be here today. I think it is a great honor, and it is certainly a privilege for me to speak to you today. I submitted written testimony, and I would like to tee up, if you will, on my background in Indian land. And,

frankly, it has been a large part of my adult life. And I can remember in 1943, when Rosebud passed a land consolidation program, I was a very small boy and one of my grandfathers was the President of the tribe when the '34 Act came in.

This bill is unique in a couple of areas. Number one, it fixes most if not all of the problems, and probably there is always tweaking here or there that we could talk about. It fixes many, many of the problems that are out there. And I think, second, the importance, it has broad support by those people in the Administration. And I certainly support Mr. Swimmer's testimony. And it has support in Indian Country.

We recognize that Indian people most often do not do wills. We look at that as some premonition that you are going to leave tomorrow if you do a will today. So intestate is the rule out there. This bill authorizes many ways to deal with that. It also protects private ownership of those trust allotted interests. And I would say on the Rosebud, going back to 1943, that we have had a consolidation program. And that's called Tribal Land Enterprise. And it in itself has been successful in the end. However, the means don't always justify the end. And I submitted information on that, that we will be talking about later.

But moving forward, I worked in trust land issues. I did title examination, curative work—which is preparing judges orders—and administrative modifications for all of the trust lands or a great majority of the trust lands in the Great Lakes region, the Minneapolis area, what was the Aberdeen area, which is now Great Plains, all of the Billings or Rocky Mountain area. Did the Portland area, which is the Northwest tribes. And then created the title plan for the State of California. So I have a great deal of experience in running title in Indian Country. I did this as a government contractor.

Additionally, I did 11 of the 19 pueblos in New Mexico. And there are clouds on a lot of title, frankly. But I would say, again, this bill addresses much of the issues. And I would hope that it doesn't get held up. It is a broad, broad step in the right direction. Again, I think it does much of what it is attempting to accomplish.

Furthermore, Rosebud has the pilot program of the ILCA land consolidation purchases. And I in 1971 to '79 served on our tribal council. I ran our land consolidation program. I did 10,000 purchases in 1 year in running that program as Chairman of the Natural Resource Committee. And, under the—under our Indian Land Consolidation Act, at that point what we did—and we had the first, the very first Farm Home Administration loan in the Nation. We had a memorandum of agreement in 1970 that authorized FMHA monies to be used to purchase Indian land. That was the first in the Nation. And, again, our Tribal Land Enterprise was first in the Nation and maybe the only one.

So we have a great deal of experience in these areas. What I would like to do, Mr. Chairman, is give my broad support to this. And, again, I want to thank all of those who are working on this.

And there is other areas of concern, obviously, that this doesn't address and it doesn't attempt to address, whether it be the Youpee issues, and that goes back to the old—the first Indian Land Consolidation Act that was signed by President Reagan I believe

January 12, 1983. And, frankly, I did not support that. It was a taking, pure and simple.

But if I could, Chairman, if I can offer anything else, I would rather answer questions specifically. And, again, I have a broad background in this area, and it is very easy to support what you folks are doing here today. And I commend the Senate committee. Thank you. If you have any questions, I would certainly try to answer those.

[The prepared statement of Mr. Colombe follows:]

**Statement of The Honorable Charles C. Colombe, President,  
Rosebud Sioux Tribe of South Dakota**

Good morning, Committee and Chairman Pombo. My name is Charlie Colombe and I am President of the Rosebud Sioux Tribe of South Dakota. At Rosebud, we are descended from the Sicangu or Burnt Thigh Band of the Tetonwan or Prairie Dwelling Lakota. It is a privilege and an honor to give testimony before the Committee on S. 1721, "A bill to amend the Indian Land Consolidation Act."

As a preliminary matter, I would respectfully ask the Committee to seek amendment of Section 7 of S. 1770 which authorizes appropriations. Federal funding for any IIM or Trust claims paid in connection with any historical accounting or internal restructuring required by trust reform under the Cobell suit or tribal claims should be paid from the United States' permanent judgment appropriation under 31 U.S.C. § 1304 and should not be paid or reimbursed from appropriations for the Department of the Interior/Bureau of Indian Affairs. The Permanent Judgment Fund should pay for the historic accounting, not current BIA appropriations because it is not right for the victims of this terrible mismanagement to be asked to forego services to pay for the accounting which should have been due tribes and their members since 1887. If the Cobell claims and the historic accounting are not paid from the said Permanent Judgment Fund it is unlikely that the accounting will be effected and that those historic claims will ever be paid.

I have attached an exhibit to my testimony which analyzes how Rosebud Sioux Tribal members who have not received the benefits that they ought to have received from the Tribal Land Enterprise (hereafter "TLE") since it was founded under Federal law in 1943. I offer this to the Committee because the Rosebud Sioux Tribe intends to bring this claim to the Committee in the near future and we will do our own accounting to demonstrate to this Committee and to the United States the breakdown in the United States' trust obligations to RST members.

In the decades that I have spent working on tribal land issues, I have identified many issues that this bill remedies:

- Indians usually do not make wills;
- Indians dying intestate leads to the application of state law when the BIA probates the intestate estates because tribes lack the authority to probate trust property;
- Most Indian Reorganization Act Era tribal constitutions prohibit Tribes from probating trust assets; and
- The Rosebud Constitution prevents the RST Courts from probating trust property.

S. 1721 would allow far greater latitude for tribal court jurisdiction by authorizing tribes to probate trust assets. Overall this legislation is the best opportunity that tribes have had, in my lengthy experience, to fix the fractionalization of trust lands. In addition, it prevents trust lands from passing out of trust ownership by allowing descendants of allottees to inherit trust land without subjecting the lands to taxation and state jurisdiction.

Tribes throughout the United States have closely reviewed this legislation in behalf of their members. Virtually all tribes favor the enactment of S. 1721 because it offers tribes and their members the chance to consolidate their land holdings while maintaining tribal jurisdiction and tribal ownership of their lands. This is a truly significant aspect of the legislation given the harsh treatment of tribal jurisdiction and sovereignty by the Federal courts in recent years.

Amending the Indian Land Consolidation Act to revise the requirements for testamentary and non-testamentary disposition of interests in trust, restricted lands, and personal property of an Indian will end the unfair application of state law to Indian property. In addition, tribes may now adopt their own probate codes to ensure that their members will inherit trust property in a timely, culturally appropriate manner.

S. 1721 repeals the limitation of any bequest of an interest in trust, restricted land, or personal property to a decedent's Indian spouse. The legislation retains permission for an Indian decedent to will such interests to the tribe with jurisdiction over the land. Importantly, the Bill adds permission for allottees to bequeath such interests to the lineal descendants of the Indian making the will or to any person who owns a pre-existing undivided trust or restricted interest in the same parcel of land in trust or restricted status. These aspects of the bill will slow the migration of trust lands to fee status by making it easier for the allottees and holders of beneficial interests in trust lands to bequeath their trust property to their descendants and relatives who share undivided fractionated interests in the same tracts of trust land.

S. 1721 regards a bequest of trust property as the bequest of the interest in trust or restricted status, unless the language of the will clearly shows that the person making the will planned to bequeath the trust property as a fee interest without restrictions or the interest bequeathed is a life estate. This Bill limits the order of the bequest of an interest in trust or restricted land as a life estate or in fee for an interest not bequeathed according to the general rule. Further, S. 1721 allows the owner of interests in trust or restricted personal property to bequeath such interests to any person or entity. Thus, it will be the will of the owner of the property interest that decides the disposition of the property, not state law or an administrative formula.

When this legislation is enacted, where the maker of a will bequeaths interests in the same parcel of trust or restricted lands to more than one person, in the absence of express language in the will to the contrary, the bequest will be presumed to create joint tenancy with the right of survivorship in the property interests involved. The Bill allows for the partition and purchase of highly fractionated Indian land by eligible Indian tribes. This furthers the ability of tribes to consolidate their land holdings, the ultimate purpose of the Indian Land Consolidation Act (hereafter "ILCA"). The Bill also sets forth a mechanism allowing co-owners of trust or restricted interests in a parcel of land to let surface leases of such a parcel without requiring the Secretary of the Interior's (hereafter "Secretary") approval of the lease.

S. 1721 declares that, after enactment, it may not be construed to limit or otherwise affect the application of any Federal law requiring the Secretary to approve mineral leases or other agreements for the development of the mineral interest in trust or restricted land. The Bill allows interests in a parcel of trust or restricted land in the decedent's estate, under specified conditions, to be purchased at probate consistent with the Bill. S. 1721 proscribes secretarial approval of a tribal probate code that prevents the bequest of an interest in trust or restricted land by an Indian lineal descendant of the original allottee, or an Indian who is not a member of the tribe with jurisdiction over the interest, unless it provides for the renouncing of interests, the reservation of life estates, and payment of fair market value.

The Act provides that authority otherwise available to a tribe to acquire an interest in trust or restricted land bequeathed by the owner to a non-Indian will not apply where the interest is part of a family farm bequeathed to a member of the decedent's family, and the inheritor agrees that the Indian tribe will have the opportunity to acquire the interest for fair market value if it is offered for sale to a person or entity that is not a family member of the landowner.

S. 1721 will make the fractional interest acquisition program a permanent program. This means that tribes can preserve their reservations and their authority over them—to the extent that trust lands exist in their respective reservations. The Act sets forth procedures for the sale of trust interests to Indian landowners. This is an important clarification; now Indians will have notice of exactly how to acquire interests in trust and restricted property. ILCA mandates that the Secretary place a lien on all revenue accruing to an fractional interest in trust land acquired under ILCA until the Secretary receives payment in full to the Acquisition Fund of the purchase price of that interest. This allows the Secretary to assist tribes in the consolidation of fractionalized undivided interests in trust lands by—in essence—providing the tribes interest free loans because the BIA prepaes the purchase price and over time the lease for the tract repays the BIA/Secretary and the lien is lifted.

The Act allows the rules of intestate succession under the Indian Land Consolidation Act or under a tribal probate code approved under the Act or under regulations made pursuant to the said tribal probate code to apply to fee patented lands. This is a major change because previously tribes didn't have the authority to probate fee lands!

It is helpful to tribes that S. 1721 instructs the Secretary to award grants to non-profit entities who provide legal assistance services to tribes, individual owners of interests in trust or restricted lands, or Indian organizations under the Federal poverty guidelines. Up to now, unless the Interior Solicitor requested that the Justice

Department represent tribes or the tribes paid the attorneys then there was no legal assistance available to further tribal interests in enhancing the tribal land base through purchase from individual tribal members.

Under the Bill, the Secretary is required to notify each Indian landowner of specific information concerning each tract of trust or restricted land the landowner has an interest in. In the past, individual landowners were frequently denied access to this important information. This is a dramatic change from existing law and policy. Nowhere in the BIA has there ever been assistance in planning or creating private and/or family trusts concerning interests in trust or restricted lands. Now, the Secretary is mandated to provide individuals with such assistance!

S. 1721 provides that as a matter of law, that after 6 years an undivided interest in a tract of trust or restricted land of a tribal member is abandoned and subject to this Act. This is important because currently heirs are required to obtain a judicial decree that a relative is deceased before the BIA can take action concerning the land. Of course, the Secretary must provide written notice to all of the heirs before holding a hearing to legally decide who the heirs to the trust property are. In addition, the Secretary must send notice annual with a response form as well as a change of name/address form to the putative owners of interests in trust or restricted land. This protects allottees by notifying them of any changes in their trust property interests the same year that the interests have changed.

For the foregoing reasons, on behalf of the Rosebud Sioux Tribe and its members I ask that you support the enactment of S.1721. Thank you for your consideration.

## EXHIBIT A

### ANALYSIS OF STEPS TO ACCOMPLISH LEGISLATIVE SETTLEMENT OF TLE LITIGATION

#### I. HISTORICAL OVERVIEW OF TRIBAL LAND ENTERPRISES (TLE)

- Organized in 1943 as subordinate corporation of Rosebud Sioux Tribe
- BIA retained direct oversight over land values, certificate values and leasing practices
- Concept to use TLE shares of stock (certificates) in lieu of cash
- Provide remedy for increasing fractionation of land ownership and to consolidate land ownership
- Develop land management plan for benefit of participating tribal members
- Provide for preservation and safeguarding the values of individual ownership of land
- Simplify land exchange process
- TLE has consolidated land, but in doing so it has eroded tribal and individual equity in land
- Organized with concept to earn 4% dividend and accrue increasing land value.

#### Example:

1943 investment	2003 value
\$100 savings, 4% interest, compounded semi-annually	\$1,073
\$100 grazing land invested in TLE	\$ 329
\$100 grazing land not put into TLE (Allotted)	\$7,900

#### TLE owner actually ends up with \$329

**For each \$100 invested in TLE in 1943, owner has suffered a loss of \$8,644**

Note, for example, \$100 invested in 1952—owner's loss would still be \$8,293

#### II. CAUSES OF THE PROBLEMS IN TLE

- All land is not equal; but, Todd County grazing land is appraised same as Gregory County grazing land. (USDA 2003 grazing land average value, Gregory \$354.00, Todd \$196.00)
- Since inception of TLE, land has not been transferred at its true value.
- By-laws not followed in valuing TLE certificates. (§28) TLE owners are continually harmed by undervalued certificates of interest.
- TLE has a history of management problems that still exist.
- No defined policy on leasing. No definition of application of "Indian Preference" so that some TLE owners, directors, employees, Rosebud Sioux Tribe Council members and favorites obtain cheap leases.
- Individuals without connections get no leases, or must bid much higher prices.
- Cheap leases transferred in direct violation of Code of Federal Regulations.
- Indian preference leases are at expense of Indian land owners.

- TLE management continues to refuse to acknowledge or address problems, and losses to owners continue.

### III. EXAMPLES OF CURRENT MANAGEMENT PROBLEMS

- Certificate value has no relationship to equity value of TLE, i.e. current certificate value is \$13.56-book value per outstanding share is approximately \$70
- No earnings or increases in equity value are allocated or accrued for shareholders
- TLE management overhead expenses exceeds \$600,000 per year, an amount equal to average annual land purchases
- Lease revenues are a fraction of market value, i.e. many of the leases are at \$6.50 an acre, average market value is \$14.00 an acre
- Lessees profit by assigning lease rights, representing income that should have been TLE's
- Adjusting lease rates and overhead expense should more than double TLE current average net earnings of \$1,500,000
- Shareholders have no effective voice in, or control over management, as TLE operates in a manner to favor those in political or management control

### IV. ACTION PLAN

To attempt to avoid continuing extensive litigation involving all existing and past certificate owners, or liquidation of TLE, the Rosebud Sioux Tribal Council has passed a motion that they prefer to have TLE seek a legislative-administrative solution for the benefit of all past and present TLE owners, including the Rosebud Sioux Tribe. The plaintiffs have currently acquiesced in that procedure.

- Obtain review of all TLE certificate transactions, to provide a means of identifying losses suffered by TLE owners.
- Losses identified shall include individual and tribal losses.
- Review undertaken by competent certified public accounting firm so that it has integrity to all parties, and to Congress.
- If possible, obtain a final verification from GAO.
- Also use services of a certified land appraiser to help determine damages.
- Assess general damage claims from deficient leasing practices and failure to comply with CFR requirements for approving and filing sub-leases.
- Pending completion of certificate review, commence drafting proposed legislative solution.
- Utilize services of U.S. House of Representatives Committee on Resources and Senate Select Committee (Indians) to prepare legislation in draft form.
- Upon completion of the certificate review, finalize the legislative proposal with application of damage recovery.

### V. TIMELINE

- June through August 15, 2004—Certificate review completed and assess damages from management deficiencies.
- September 1, 2004, final draft of proposed legislation, including damage outline.
- October 2004, final proposed legislation completed in form acceptable to House Committee on Resources and Senate Select Committee (Indians)

### VI. CONCLUSION (REASONS THAT IMMEDIATE ACTION IS VITAL)

On paper, TLE looks like a successful Indian enterprise. TLE audits disclose a net worth of over \$42,000,000, with average net earnings exceeding \$1,500,000. A closer look creates a rather disturbing picture. It is the picture of a company that has built a net worth at the expense of its owners, rather than for its owners.

- When through death, illness or other exigency, an owner has to sell TLE certificates, the owner receives \$13.56 for each certificate (from 1997 through May 2004 it was \$9.97). Those same certificates have a book value of over \$70.00. TLE receives the windfall, at the expense of its owners.
- Book value is only a portion of actual land value. TLE management cannot even provide an accounting of how many acres are under TLE management.
- TLE has very seldom paid dividends, or returned any benefit to its owners. Annual TLE earnings are not accounted for, and are used in the manner determined by TLE management.
- Any TLE owner who has the audacity to complain suffers the consequences of management's unofficial blacklist.
- TLE continues to lease land for below market value rates, and redeem certificates at a fraction of their value

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The CHAIRMAN. Thank you.

Chairman Lyons.

**STATEMENT OF THE HON. MAURICE LYONS, CHAIRMAN,  
MORONGO BAND OF CALIFORNIA, BANNING, CALIFORNIA**

Mr. LYONS. Thank you, Chairman and Committee, for inviting the Morongo Band of Mission Indians to provide testimony on S. 1721.

The Morongo Tribe has been actively involved working with those drafting the legislation over the past few years. I have testified in front of the Senate Indian Affairs Committee in 2002-2003 in an effort to get this bill passed. I come before you today with the same intent.

The Morongo Reservation is located 17 miles west of Palm Springs. Our tribal membership enrollment is 1,200. Our reservation comprises approximately 33,000 acres of trust land, of which 31,115 are held in trust for the tribe and 1,286 acres are held in trust for allottees and heirs.

Provisions within the Indian Land Consolidation Act of 2000 prompted the Department to send out a series of notices to individual tribal members alerting them to expect changes in the rules of intestate succession and inheritance. These provisions would constrain the passing of interests in trust and restricted lands to non-Indians, and the notices had an immediate detrimental impact on our tribe's ability to plan for the future to manage the tribal lands affected and our tribal members' ability to pass down to their children and grandchildren the land.

While the Department has to date been willing to not implement those amendments of the 2000 Act, we know that they are not able to defer it forever. To this end, we encourage you to act swiftly on this matter.

We at Morongo share the desire of Congress to preserve trust status of existing allotments and other Indian lands. We appreciate the Committee's hard work in 1999 and 2000 to strike a deal between allottees and sovereign rights of interest of tribal governments. We are now—however, we now recognize unintended consequences of the 2000 Act have come about.

For example, because the 2000 Act defines Indian, the Morongo Band is faced with having to revise its own membership criteria in order to enable our enrolled members to pass their interest in trust allotments to their children. Congress must understand, we do not feel revising our membership is the solution. The fact is that changing the membership is a divisive matter for tribal governments and their members. We should not be forced to amend our membership criteria in order to protect the rights of our members' children to continue having interest in family lands.

Under the—further, under the 2000 amendments to ILCA, in an effort to prevent Indian lands from passing out of trust, non-Indian heirs were allowed to receive a life estate on Indian lands. Perceived as a substantial new restriction, this provision actually reversed the effect, prompting many tribal members to petition to have their lands taken out of trust to protect the interests they made in the lands through improvements.

S. 1721 includes the solution to the problem we face in California. Specifically, the interplay between the revised definition of

Indian and the new definition of eligible heirs will provide for anyone that owns an interest in trust land or restricted land in the State of California to continue to qualify as an Indian for the purpose of this act. As such, the heirs of that individual, without respect to the membership and qualifications of the Morongo Tribe, will be eligible to own trust lands upon the death of the owner. These changes allow the members of my family who no longer—who may no longer be eligible for membership in the Morongo, but they are definitely American Indians, to carry on the tradition of our family on our lands.

Due to the unique history of reservations and rancherias in California, this definition is highly warranted. Mr. Chairman, as you know, many of the tribes which exist today in California are cobbled together based on geographic proximity of native people. For example, the Morongo Band of Mission Indians is made up of people from descendents from Cahuilla, Chemehuevi, Luiseno, Serrano, many, many others. There are people who live in the same area combined into Morongo Reservation. The situation is shared by many tribes located in California and is the basis for a much needed definition of these native people in California.

I thank you, Mr. Chairman, for letting me ramble on here. Thank you.

[The prepared statement of Mr. Lyons follows:]

**Statement of The Honorable Maurice Lyons, Chairman,  
Morongo Band of Mission Indians**

Thank you, Mr. Chairman, for inviting the Morongo Band of Mission Indians to provide you with our testimony concerning S. 1721, the American Indian Probate Reform Act of 2004, a bill to amend the Indian Land Consolidation Act. The Morongo Tribe has been actively involved in working with those drafting this legislation over the past several years and I have testified before the Senate Committee on Indian Affairs in 2002 and 2003 in an effort to get this bill passed. I come before you today with the same intent.

As you might know, in 2002 Senator Ben Nighthorse Campbell, Chairman of the Senate Committee on Indian Affairs asked the Department of the Interior to delay implementation of certain provisions of the Indian Land Consolidation Act Amendments of 2000 (the Act) pending further Congressional review of concerns and confusion that has arisen in Indian country about the consequences—both intended and possibly unintended—of those amendments. To date, the Department appears to have honored the Senator's request and we are thankful for their willingness to do so.

As I have explained to members of the Senate, provisions within the 2000 Act prompted the Department to send out a series of notices to individual tribal members alerting them of expected changes to the rules of intestate succession and inheritance. These provisions would constrain the passing of interests in trust and restricted land to non-Indians and the notices had an immediate detrimental impact on our tribe's ability to plan for the future and manage our tribal lands effectively and our tribal members' ability to pass their land down to their children and grandchildren.

While the Department has to date been willing to not implement the amendments from the 2000 Act, we know that they are not able to defer this action forever. To this end, we encourage you to act swiftly on this matter.

The Morongo Reservation is located approximately 17 miles west of Palm Springs. Our tribal membership enrollment is 1,200 and the reservation comprises approximately 33,000 acres of trust land, of which 31,115.47 acres are held in trust for the tribe, and 1,286.35 acres are held in trust for individual allottees or their heirs.

We at Morongo share the desire of Congress to preserve the trust status of existing allotments and other Indian lands, and we appreciate this Committee's hard work in 1999 and 2000 to strike a balance in the Indian Land Consolidation Act Amendments of 2000 between the individual property rights and interests of



allottees and the sovereign rights and interests of tribal governments. However, we now recognize unintended consequences from this legislation have come about.

For example, because of the way that the 2000 Act now defines "Indian," the Morongo Band is faced with having to revise its own membership criteria in order to enable some of our enrolled members to pass their interests in trust allotments to their own children. Congress must understand that we do not feel revising our membership is a solution. The fact is that change of membership is a very divisive matter for tribal governments and their members. We should not be forced to amend our membership criteria in order to protect the right of our members' children to continue having interests in their family lands.

Further, under the 2000 amendments to ILCA, in an effort to prevent Indian lands from passing out of trust, non-Indian heirs were to be allowed to receive a life estate in Indian lands. Perceived as a substantial new restriction, this provision actually had the reverse effect, prompting many tribal members to petition to have their lands taken out of trust to protect the investments they made in the lands through improvements.

S. 1721 includes a solution to the problem we face in California. Specifically, the interplay between the revised definition of "Indian" and the new definition of "eligible heirs" will provide for anyone that owns an interest in trust or restricted land in the State of California to continue to qualify as an "Indian" for the purpose of this Act. As such, the heirs of that individual, without respect to membership qualifications in the Morongo Tribe, will be eligible to own trust lands upon the death of the owner. These changes will allow members of my family who may no longer be eligible for membership in the Morongo Tribe—but are most definitely American Indians—to carry on the traditions of our family on our lands.

Due to the unique history of reservations and rancherias in California, this definition highly warranted. Mr. Chairman, as you know, tribes which exist today were largely cobbled together based on the geographic proximity of native people. For example, the Morongo Band of Mission Indians is made up from people who descended from Cahuilla, Chemehuevi, Luiseno, Serrano and many others. These people all lived in the same area and where combined into the Morongo Indian Reservation. This situation is shared by many of the tribes located in California and is the basis for a much needed definition for those native people who live California.

Mr. Chairman, thank you for your time and willingness to hear about the concerns of the Morongo Band of Mission Indians.

The CHAIRMAN. Thank you, Mr. Chairman. I understand that Mr. Emory will be available to answer any questions if any of the members have questions specifically that they would like him to answer.

President Colombe, it is nice to hear your testimony. I didn't realize the extent of your background on this particular issue. Maybe we can pull the entire committee together and you could spend a couple of days trying to educate us so that we understand what this bill does.

But I guess my first question to you is that would the—are the Rosebud Sioux prepared to adopt a probate code of their own if this bill were to pass?

Mr. COLOMBE. Mr. Chairman, I think the Rosebud Sioux would be prepared to adopt a probate code. However, like most IRA tribes, Indian Reorganization tribes, we are prohibited by our current constitution from probating trust interests. So——

The CHAIRMAN. And how do we fix that?

Mr. COLOMBE. I think this bill opens the door for us to do that.

The CHAIRMAN. So if the bill becomes law, you believe that you will be able to do it?

Mr. COLOMBE. I believe it would be in our best interests to do it, and I believe that the people would support that very strongly.

The CHAIRMAN. Obviously with your experience on this, do you have any feeling for how many other tribes would be in a similar situation that they would adopt their own probate code?

Mr. COLOMBE. Mr. Chairman, I think if you look at the fractional interests, in the Great Plains region we have roughly 30 to 33 percent of all the fractional interests in the United States. You go then to the Rocky Mountain region, which us old guys call the Billings area, they have about the identical amount. So 60-some percent of all the fractional interests in the United States are in about 7 States there in the Midwest. I believe that the vast majority of us in South Dakota—we are all of Lakota, Dakota, Nakota descent. We all speak the same language, if you will. Our friends to the west in Montana, Wyoming, who have the equal amount, think a lot like we do. We all have the same problems, it is very rural. On the Rosebud Reservation, as an example, Chairman Pombo, there is 6,100 of our tribal members who have fractional interests. However, also on Rosebud there is 4,100 tribal members from the Oglala Sioux Tribe that have interests on the Rosebud.

So we are so interconnected through land ownership that I think, again, while I can't guarantee that everyone will adopt a probate code, I think uniformly those tribes will find the benefit of this bill.

The CHAIRMAN. And obviously you would be encouraging the other tribal leaders to——

Mr. COLOMBE. Absolutely.

The CHAIRMAN.—to adopt one?

Mr. COLOMBE. Yes.

The CHAIRMAN. Let me ask you this. I am told that there are very few Native Americans that have a will.

Mr. COLOMBE. That is true, sir. And like I said, it's more of a cultural thing. We, as an example, seldom ever hear someone say—I wouldn't say to a councilman: Now, if you died tomorrow. I mean, it would be like whoa, he is sending me where I don't want to be.

I think, Chairman, that we can work on processes to educate our people in those areas. And I believe—Mr. Swimmer brought up a deed process wherein—that is legal I think in all States—that might be an answer to the lack of wills or dying intestate.

The CHAIRMAN. Obviously that is a major problem. And in listening to Mr. Swimmer's testimony and dealing with I believe you said 45,000 unidentified folks that own an interest, but they don't know where they are. I would rather have the individual decide who their heir is, whether it is by their cultural tradition or what have you, whoever their heir is; it should be that individual that is making that decision. And if we don't have a higher percentage of folks that have a will and a process in place, then you allow the government to make that decision. And I don't think any of us really want that.

So I do think that is an issue that maybe we can put our heads together and figure out a way to deal with that.

I just have one more question I wanted to ask Chairman Lyons. We have had the opportunity in the past to talk about the Morongo's situation with their land ownership. Can you tell me how many other tribes are in the same kind of situation that you are in? Do you have a feeling in California for how many are in the same situation?

Mr. LYONS. There is very few in our situation. Most of the tribes in California are not allotted tribes. Ours—I think there is maybe Agua Caliente and maybe just one or two up north. But the rest

are tribally assigned. So the tribes still own the property. But ours is a unique situation.

And I am one of those that don't have a will and won't have one. But I have taken care of that. I have deeded all of my stuff. I have nothing. So I have nothing left, so I have taken care of it. But it is a unique situation for Morongos, especially, that this get passed and as soon as possible.

The CHAIRMAN. Well, I have had a chance to discuss that with you in the past, and hopefully if we can get this legislation through and onto the President's desk, it can help to rectify some of the issues you are dealing with. But thank you very much.

Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman.

I couldn't help when you were talking about cultural differences to think about Italian Americans, which is my ancestry, and they are just the opposite. You know, I remember some of my ancestors actually had not only the plot but the monument with the date when they were born and the dash, and the only thing missing was the date that they died long before they even, you know, 10 or 12 years before they died. There really are differences.

I just wanted to ask the Chairman and the President. We have talked about how land fractionation robs land of its value and its usefulness. I am just wondering if either of you would be able to describe how the land consolidation benefits the tribe. In other words, are there plans to make use of consolidated land? Will it spur economic development? You know, maybe give us some examples of what we are trying to accomplish is actually favorable and what your plans are and how you deal when it is consolidated, if you could.

Mr. LYONS. Right on our reservation, on the corner where I live, there is a 15-acre piece, and there must be 200 to 300 people in that. And what we are planning to do is when we get that all back to the tribe, we are going to open up, put our homes for the people that are moving back to the reservation in—we will allot one-acre parcels out to them so they can build a house there. If the Bureau ever gets the title search done. We have over 200 people waiting for 2 years now for a title search. The bank through the loan program won't do it because the title search is not done.

But that is what we plan to do with it, is all of our allotted land is almost used up so we have got to get that land back into the tribe to give it back to our people.

Mr. PALLONE. Thanks.

President Colombe, did you want to comment?

Mr. COLOMBE. Yes, sir. I think the first thing it does, it restores land to tribal jurisdiction. And that in itself is a giant problem in Sioux Country and all across the Great Plains and Rocky Mountain region.

Second, it does allow for economic development because it makes the land usable.

And, third, we have, since the Indian reorganization, had the authority contained in the '34 Act for the government to put monies into land consolidation purchases. This Act does that. And, again, I think those questions that Mr. Swimmer spoke to, it is a lot cheaper to buy the land than it is to administer those small trust

estates. And we need—we need as we go along to work together on this. And, again, there is many, many areas of concern that this addresses, someone said 100 pages. And obviously it is very complex. But I think, again, the most important thing is it places that land under tribal jurisdiction rather than having it float around, if you will, under a situation where the tribe cannot pass a probate code, where State codes are used, and it deals with the inheritance of it and the purchase.

Mr. PALLONE. You had mentioned President Colombe, you said something in your statement about means don't justify the ends, and you had submitted something about, you know, the way things were going about—the way we were going about things. Was that specific to Rosebud, or——

Mr. COLOMBE. Yes, sir. That is specific to Rosebud. Again, since 1943, we have had a land consolidation program there, and many thousands of our allottees have been harmed through that program, and it is basically lack of oversight by the government that allowed that to happen. We have also——

Mr. PALLONE. Is that going to be changed with the bill that we are considering or will that help?

Mr. COLOMBE. It will help in that we will have a new consolidation program in place under the ILCA and we will be able to clean up and do an accounting on those people who have been harmed by the old program.

Mr. PALLONE. OK. Thanks a lot.

Mr. COLOMBE. So it opens the door for us to operate a land consolidation program, which we are currently doing under the ILCA, and are continuing with our Tribal Land Enterprise.

Mr. PALLONE. OK. Thanks.

Thanks, Mr. Chairman.

The CHAIRMAN. Mr. Renzi.

Mr. RENZI. Thank you, Mr. Chairman.

Welcome both, Mr. President, Mr. Chairman, thank you both for coming today.

Mr. President, I wanted to kind of draw on your background and your expertise for a moment and ask, when we talk about the consolidation and we look at the element of forced sales, do you anticipate that being a problem in the future of how we implement the program?

Mr. COLOMBE. No, sir, I don't. I think that the forced sales is, again, it is not like the Act of 1983, and it has processes that I think protect the individual ownership interests.

Mr. RENZI. Sir, following up on the Chairman's line of questioning. When you talk about Rosebud having a code, a probate code that you are ready to move forward with, and you in your statement talk about the fact that, in a positive manner, that you look forward to tribes being able to individually adopt their own codes, do you see us coming back 5 years from now and recommending one model over another as it relates to one set of probate code? Or will the patchwork be able to accomplish—a patchwork across the Nation be able to accomplish the ability to consolidate without leaving gaps or clouds on the titles or the background investigations?

Mr. COLOMBE. I think this Act sets up the framework to work within for tribes. Even without the adoption of their own code, this authorizes a process that I think would be, most of us can be very supportive of.

Mr. RENZI. OK. Mr. Chairman, I——

The CHAIRMAN. Would the gentleman yield for just a second?

Mr. RENZI. Yes, sir.

The CHAIRMAN. On his question, would it not be possible to take, because of your experience—I mean, obviously you have done this over the years—to take what you guys are doing and kind of hold that up as a model for other tribes to look at? And as we go through this in the future, being able to tell other tribal leaders, look at what Rosebud Sioux have? I mean, wouldn't that, I mean, I think Renzi is right with this. It would make things a lot simpler if we had a model that fit within the law and actually worked within the current system. I think this is a real good idea to try to come up with something like that.

Mr. COLOMBE. Chairman Pombo, sir, we fully intend—like I said, we support this. And obviously there is other Indian land issues out there. I can name some of those that are gigantic. As an example, let me toss something out that this doesn't address at all but is a big issue at Rosebud. We have had 1,400 plus HUD homes built there. 98 percent of those are built on tribal land. Many, many of those were built in the '60s, '70s, '80s and '90s and now are paid for. The Housing Authority is issuing bills of sales to those houses; however, the vast majority of those, 90-some percent, are built on tribal land. The tribe is bound by statute that they cannot sell that land. So suddenly you see the size of that problem. And we need to take the ILCA program while we are in the process of buying land for the fractional interests, we need to take some of those fractional interests and allow individual Indian folks to buy those and allow them to exchange those fractional interests for a tract that their house is sitting on. Because think of the fact that only a thousand of those homes—and if they were only worth 50,000 apiece, they are paid for, but those people don't have merchantable title. So we are going to use this program—and this is across allotted Indian Country that this happens. So we will use this as a tool to exchange land with our members, and we can trade trust deed for trust deed and they will truly end up with a merchantable title.

As an example there, if you had a thousand of those homes worth 50,000 apiece and they were paid for, that would put \$50 million in our economy that isn't there today.

So we not only support this—and there is other areas that we will use this bill to help us in.

Mr. RENZI. Mr. Chairman, just one follow-up. Thank you, sir.

Sir, I appreciate the insight and the depth of your substance. Can you take that same description, apply it to business site leasing as it relates to commercial economic interests where, particularly like on the Navajo Reservation, 18 million acres, the largest Native American Indian reservation in America, and we trying to go to BIA to get approval for business site leasing. And, as the Chairman pointed out, not only are we having the backlog that Mr. Swimmer addressed as it relates to residential construction, but we

also have a backlog as it relates to commercial entities who are willing to come to the Navajo Nation, let's say a Wal-Mart or a Denny's restaurant or something that is going to allow the Native Americans to spend their money on the reservation, and allow that dollar to maximize itself and stay on the reservation rather than going off the reservation and providing jobs. And yet, when we look at finally consolidating fractionalized interest, we are not able then to in a timely manner get approval for a business site leasing so that those economic interests will stay the course and build.

Can you help me understand that a little bit? Will there be a benefit there on the commercial side?

Mr. COLOMBE. I think the great benefit, sir, is that we—as I stated, we are working on an Indian land bill, if you will, and we are all getting a much broader understanding of those problems out there, and as I spoke about the housing issue at Rosebud—and that is across the whole Midwest that this issue is out there. People have paid for something, and now they don't have title to it. That is a humongous issue. Isn't it? Imagine buying a home and not owning it because it is attached to a piece of land that can't be sold.

The commercial development has been a giant problem, and we have only had three businesses on the Rosebud Indian Reservation in the last 10 years that have grossed over a million dollars a year by Indians. And, frankly, my family or myself started all three of them.

We have other problems in those areas. I think there is, there is some new regulations that are coming that are dealing with—they are dealing with business leases. And, again, I would say this is a first step.

Mr. RENZI. I don't want to take too much time. I just wanted to point out to the listening audience that we can't effectuate a change in Native American Indian housing, we can't increase Native American Indian housing until we increase the jobs and the earned income on the reservations; and we can't do that until we have better business site leasing provisions. And hopefully this is a first step, I think is what your point is.

Thanks, Mr. Chairman.

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman, and I wanted to thank President Colombe and Chairman Lyons for their testimony.

I wanted to ask you gentlemen if you knew how the Federal Government institutionalized the definition of the word "Indian," because the problem here is that this isn't just for the Native Americans. This also has a very, very negative and serious impact not only to the native Hawaiians and even to my own people. And let me tell you, it was the U.S. Congress that institutionalized the definition of an Indian. An Indian is you have to be at least 50 percent blood quantum Indian to be considered an Indian. And to me, it is a very racist and a divisive not only policy, but this is what Congress enacted years ago defining what an Indian is even today.

And Chairman Lyons, you indicated that the problem now of defining what an Indian is and who is an heir to the very issues that we are discussing today. Let's say that I am a member of Morongo Tribe and I am 50 percent blood Morongo and an Indian in that

respect. And if I marry a non-Indian, what happens to my heirs? Would they still be in compliance of defining of what an Indian is?

Mr. LYONS. Under this act, yes. The heirs from that union still will be defined as an Indian in this act.

Mr. FALEOMAVAEGA. And then in your tribal constitutions and laws, both President Colombe and Chairman Lyons, the rights of the tribal members—this is a concern that I have. Let's say three or four generations down the future, what would be the rights of the heirs of the members of this tribe who are of less than 50 percent quantum and blood and so-called being considered as an Indian? Will this bill protect the rights of those who have less than 50 percent blood quantum?

Mr. LYONS. Yes.

Mr. FALEOMAVAEGA. And your understanding—and I would like to know the latest in Indian Country. If now defining an Indian you don't have to be 50 percent blood quantum to be considered an Indian. Is that no longer the case among Native Americans?

Mr. LYONS. That is no longer the case.

Mr. FALEOMAVAEGA. Because this bothers me, because the native Hawaiians are fighting among themselves right now simply the Congress also enacted legislation to define what a native Hawaiian was, and that was 50 percent to be considered a native Hawaiian. And the same thing they did for my people, too, years ago. So we have got some very serious issues on this.

But I just wanted to ask, is the new definition of Indian according to Federal law, regulations, or policy, you don't have to be 50 percent blood quantum to be considered an Indian?

Mr. LYONS. No, you don't.

Mr. FALEOMAVAEGA. So what is the new definition now to be considered an Indian? Because I wanted to——

Mr. LYONS. It is ours—on our reservation it is according to the role of, I forget what year it is, but—and having Morongo blood. You just have got to have Morongo blood in you to be a Morongo Indian.

Mr. FALEOMAVAEGA. Mr. Chairman.

Mr. COLOMBE. Sir, if you are not enrolled, then this defines it.

Mr. FALEOMAVAEGA. Indian.

Mr. COLOMBE. An Indian. Which I think is something that we all can support.

Mr. FALEOMAVAEGA. So it is fair. In other words, as long as you are enrolled, whether are 1-10th or 1-18th, you are still an Indian, a member of the tribe?

Mr. COLOMBE. And then if you are not enrolled, this defines it.

Mr. FALEOMAVAEGA. If you are not enrolled, then you have to be 50 percent blood quantum?

Mr. COLOMBE. No. Two degrees of consanguinity, which is the great grandfather.

Mr. FALEOMAVAEGA. Let me share with you the absurdity of this whole blood quantum thing that has unraveled even within my own tribe—I say my own tribe, the Samoan Tribe. I don't know if you have heard of my people. And we go to court in terms of who will be the new chief if the members of the tribes and the clan cannot decide, so the court makes a decision. And one of the issues to be considered is the amount of blood quantum that you have as a

member of this clan that you are going to be competing for the tribal chairmanship of that clan. And as I said, the absurdity of it all is that, like today, I am—four generations ago great great grandfather was a paramount chief, so therefore I am only 1-18th blood quantum of the member of the clan; but if I win the case tomorrow in court, I am all of a sudden 100 percent paramount chief of that clan simply because of the way that Congress had enacted the law to determine what a Samoan was. And that is that you have to be 50 percent blood quantum in order to be considered a Samoan. And I was just very curious.

Now, under the proposed bill, will this in any way impact the current problems we are having with the Indian Trust Fund on all the collections of the lands and the mineral rights and the situation that we are still not able to resolve, by the way? Some estimates from the 2 billion to \$10 billion that Indian, the funds have not been properly—not only properly held in trust by the Federal Government; but will this bill in any way have a negative impact on the rights of our Native American community that have assets or financial holdings under the Indian Trust Fund?

Mr. COLOMBE. Sir, I think it will have a positive impact. It will resolve many, many of those issues that are in Hodel. And, again, that is why I think it has such broad support. It has appealed to people who don't have the experience that I have been fortunate to have.

Mr. FALEOMAVAEGA. Chairman Lyons?

Mr. LYONS. I agree with him. I totally agree with him, with President Colombe.

Mr. FALEOMAVAEGA. Just one quick comment, Mr. Chairman. I know my time is over. You mentioned earlier about housing. We had developed a law to amend the—allow our veterans—I am a Vietnam veteran. Because for years the tribal lands, homestead lands among the Hawaiians and communal lands among Samoans, we couldn't get loans from the lending—from banks, commercial banks because of the status of our lands. And now I want to note for the record that the Veterans Administration has given a special program to allow our vets to receive loans to build their homes on tribal lands even though they cannot be—you know, you cannot sell or convey it in fee simple. And I thought that this was a very positive result. And maybe it is something that can be done also to give assistance to the Indian tribes.

Thank you, Mr. Chairman, and I thank the Chairman and the President of the—it is just always an honor to have our distinguished leaders from the Native American community appear before the Committee. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bishop.

Mr. BISHOP. Thank you. I appreciate the comments you made on this bill. You clarified some of the points to it. In every bill that comes before us there has to be a tradeoff of winners and losers. Can I just ask you, are there any tribes out there of which you are aware that are opposed to anything that is going on there because they see themselves as losers in this process?

Mr. LYONS. I don't see any in California, to tell you the truth. I have not heard of any in California that are opposing it. None



have come to me and told me, because they know I have been working on this for quite some time. So I don't know of any.

Mr. COLOMBE. Sir, I think it is the most significant piece of land legislation—trust land legislation in my lifetime. And I believe most tribes recognize it as being a very workable document, and we also look at it as a process of education. And, yes, we have other issues that this doesn't resolve, but it opens the door. It is that first step. And I think there is broad support. And I have heard different times—and it has had a fair hearing. There is many, many people who have worked on this. And I personally have been very involved in it since actually 1971, in this process.

And, again, the first Act was signed by President Reagan January 12, 1983, which it didn't have that support. That is where the Youpee case came. But this, I know of no one. There may be testimony that is written and otherwise that opposes this. Frankly, I don't know where it is at.

Mr. BISHOP. Then I have to congratulate you and the sender for reaching that unanimity. Thank you for your time for being here.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Herseth.

Ms. HERSETH. Thank you.

And, again thank you, President Colombe. And I want to thank you again for being here and traveling from South Dakota. I also want to thank Chairman Lyons for his testimony as well.

If I could just follow up from the line of questioning that Chairman Pombo established at the outset. And we talked about assuming the bipartisan support of the bill as we move forward, assuming it becomes law. You pointed out that the Rosebud Sioux Tribe constitution as well as other IRA tribes have provisions prohibiting the courts, the tribal courts from probating. So the first step would be, before whether it is the probate code that the Rosebud Sioux Tribe may be considering, or as that may become a model or any other model or uniform code that each tribe would assume and would adopt, the first step would be to amend the tribal constitution?

Mr. COLOMBE. Actually, this allows for a probate process that is within the current system. What it would do basically is we no longer have to follow the State probate code. We would follow this code in essence.

Ms. HERSETH. OK.

Mr. COLOMBE. If that is clear. Then later on, if we choose, opt to doubt our own probate code, then we have to obviously amend our own constitution and come forth with a probate code. But in the interim this takes us out from under that State probate code and this is a much better document than the State would set forth.

Ms. HERSETH. Thanks for clarifying that. And then I just wanted to give you an opportunity, because of the depth of your experience and expertise on these issues, President Colombe, in addition to Congressman Pallone's question about the use of the consolidated lands for economic development and other uses, and then of course the question here as it relates to trust reform. Are there any other benefits to this proposal as you have seen based on the Rosebud Sioux Tribe's participation, the pilot program, that you would want to elaborate on as it relates to the large land based tribes in South

Dakota and then throughout the region, as you mentioned, with 60 percent comprised within the 7 States predominantly in our region?

Mr. COLOMBE. Yes, there are. There is a provision in here to provide legal services, which is a first. And, frankly, that is a very important part of this bill. That is—you know, it is put in there, and I don't think a lot of people will see the value of that. But understand that many times there are no legal services and no understanding. And it is such a complex field of law, Indian land title is, that there is not a lot of expertise there.

Ms. HERSETH. Well, just to follow up from that then in terms of the provisions as it relates to legal services. How about for the tribal courts themselves in administering and being involved in probate? Do you see other resources being necessary in assisting the tribal court system in engaging now under the provisions provided by the bill?

Mr. COLOMBE. I think the jury may still be out on that. However, I would not recommend amending anything at this point. I think it is so important to get legislation in place and then build on that at a later date. And that is a—I think it is very important that we understand that it does create property rights. And most tribal codes do not have a process to protect individual property rights. So that portion of it—again, it is very complex, it is long. But there is—frankly, if I had something—and I have been over this, I have had Mr. Emory and another group of lawyers who I have worked with over the years, some of them very astute in these areas, have reviewed this with me, for me, and we support the bill. So I really appreciate all those other bells and whistles that are in it.

Ms. HERSETH. Very good. Thank you. I yield back. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. I appreciated the comments of our witnesses and those of the panel members, but I have no specific questions.

The CHAIRMAN. Thank you.

Mrs. Christensen.

Mrs. CHRISTENSEN. I have no questions, either, Mr. Chairman.

The CHAIRMAN. Well, thank you very much. I want to thank this panel for your testimony. It has been very informative and very helpful for the Committee to have you. I appreciate both of you traveling to be here and to help us to understand this issue greater. Thank you very much.

Mr. COLOMBE. Thank you, Chairman and Committee. I am extremely privileged to have been here today, and God be with you.

The CHAIRMAN. Thank you.

Mr. LYONS. Thank you.

Mrs. CHRISTENSEN. Mr. Chairman.

The CHAIRMAN. Ms. Christensen.

Mrs. CHRISTENSEN. Thank you. I would like to just ask unanimous consent to have the statement of Representative Raul Grijalva and of Dale Kildee included in the record.

The CHAIRMAN. Without objection, so ordered.

[The prepared statement of Mr. Kildee follows:]

**Statement of The Honorable Dale Kildee, a Representative in Congress  
from the State of Michigan**

Good morning, Mr. Chairman. Thank you for holding this hearing today on such an important issue. The complex issue of fractionated ownership of Indian lands is a result of federal policy designed to break up tribal lands. Beginning with the passage of the 1887 General Allotment Act, Congress began enacting laws requiring the allotment of tribal land to individual Indians. Allotment laws provided 40-, 80-, and 160-acre tracts to individual Indians. Congress stopped the allotment process in 1934, after a loss of millions of acres of tribal lands and hundreds of thousands of acres that were lost to taxes that Indians did not know they owed.

Because of the allotment policy, Indian allottees face the complex problem of owning fractionated interests in allotted land. Today, it is common for hundreds of owners to hold an interest in one tract of land.

These owners are heirs of the original allotment holder whose land can become more fractionated as the number of beneficiaries increases. This means that hundreds of beneficiaries could own shares in income derived from one tract of land.

While Congress has attempted to deal with land fractionation by passing the Indian Land Consolidation Act and amendments to that Act, problems still remain.

We gather today to hear testimony regarding Senator Campbell's bill that once again attempts to deal with the issue of fractionated interest in lands. I look forward to hearing today's testimony. Thank you.

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[The prepared statement of Mr. Grijalva follows:]

**Statement of The Honorable Raul Grijalva, a Representative in Congress  
from the State of Arizona**

I would like to express my thanks for the prompt scheduling of this hearing on S. 1721. Few issues are more complicated than issues concerning allotments on Indian reservations. Also, we should never lose sight of the fact that the allotting of Indian reservations was opposed by both Indian tribes and their members. Often Indians could only be induced to accept allotments under the threat that if they did not accept the land it would be given to non-Indian settlers. This is often exactly what happened. After land was allotted to individual Indians the remaining land was declared to be "surplus" land and was made available for only a fraction of its value.

As the Chairman is aware, the Indian Re-Organization of 1934 (IRA) expressly repudiated the policy of allotting Indian reservations. It also created a process for reversing the effect of the allotment policy. For example, it prevented allotted land from being taken out of trust status. Those Indian tribes that organized themselves under the IRA entered into a contract with the federal government. I am sure we all agree that such a contract cannot be changed by one side without the approval of the other party to the contract. But in 1948 Congress apparently tried to unilaterally amend that contract by allowing land to be taken out of trust status.

Ironically, the effect of the 1948 law happens to fall hardest on Indian tribes like the Gila River Indian Community (Community) that are trying to working to combat the growing problem of land fractionation. I have the pleasure of representing the Community. The Community is working with the Department of the Interior to address fractionation, for example as a participant in the pilot project to acquire fractionated interests. S. 1721 would expand and strengthen this important program. The Community has not limited itself to the use of federal resources in this effort to address fractionation. As I understand it, however, the Community must often decide between acquiring lower value fractional interests in land or acquiring higher value parcels that may be taken out of trust. The only rationale choice is for the Community to acquire the higher value parcels of land. As a result, the problem of fractionation continues to increase on the Reservation, even as the Community tries to work with the federal government to resolve this growing problem.

I know the Community worked very closely with the Senate sponsor of this legislation, Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, when this bill was considered in the other body. The Community was very close to reaching a compromise on some amendments to the bill. In fact, at the request of Senate Indian Affairs Committee staff, the Community had begun to consult with the staff of this Committee to discuss its proposed amendments. At this juncture, Chairman Campbell perceived an opportunity to move the bill to this body without any amendments. In a good faith effort to keep this important legislation moving the Community did not object to moving S. 1721 with the understanding that Senator Campbell would assist the Community's effort to obtain the amendments it is seeking.

I applaud this cooperative attitude and I look forward to working with the Community and the Chairman and Ranking Member of this Committee to develop amendments that reflect the Community's string desire to eliminate fractionation on its reservation lands and to prevent the creating of a patchwork collection of allotted, trust, and mixed ownership.

I thank the Chairman of this Committee for his assistance on this important matter.

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The CHAIRMAN. I would like to call up our next panel.

Marcella Giles, of the Indian Land Working Group, and Lisa Oshiro, representing the California Indian Legal Services. If I could just have you stand and raise your right hand.

[Witnesses sworn.]

The CHAIRMAN. Thank you very much. Let the record show they both answered in the affirmative.

Welcome to the Committee. I want to thank you for your patience and in waiting for this point.

Ms. Giles, if you are ready, we are going to begin with you.

**STATEMENT OF MARCELLA GILES, ESQ., MEMBER,  
INDIAN LAND WORKING GROUP**

Ms. GILES. Thank you. Thank you, Mr. Chairman, and thank you, members of this committee. On behalf of the Indian Land Working Group, I would like to thank you for the opportunity and for this, to make statements at this hearing, and to commend the Committee for its consideration of this very, very important piece of legislation.

The Indian Land Working Group is represented in this piece of legislation in a manner in which I think exceeds almost a decade and a half of members of this association working toward the end result that is contained in this legislation. For many years, the association represents grassroots individual Indian owners who face this problem day in, day out, every week, every year, and trying to work with their tribal leadership, in trying to work with the bureaucracy, also find what I think Congressman Rahall said is very complex. And if the lawyers and others find it complex, you can imagine how individual Indians trying to make usable their land find the position and the status that they are experiencing today.

In general, the Indian Land Working Group supports this legislation. Many of the provisions represent many years of hard work and trying to bring these issues to the forefront in order to preserve their interests.

There are four particular provisions that I would like to note for the Committee. The first one is in fact, as has been discussed, is a comment that consolidation agreement during probate. It is at this time during probate that many Indians landowners have found themselves in probate, whether they have visited with the ancestor or with the decedent and find themselves in an intestate position, these consolidation agreements are put into effect by a probate order, an order from the probate court. That is a plus and an opportunity that the association has tried to work with Indian landowners in looking at some of the estate planning opportunities before they get to probate, but particularly in this piece of legislation that vehicle is provided.

There is also a change in the consent requirement for leasing.

I would also like to state for the record that we do have a small error, that the change that is reported in this legislation is that 90 percent consent is now required if there are five or less owners in a parcel, and I think an error there, we had 5 percent.

A third part again which has been provided or talked about is the probate code and legal assistance grants. This is where our association has particularly been active in working with tribal leadership and working with land associations that will work with their tribal leadership in developing probate codes, consulting with the tribal leadership, and providing assistance in estate planning. Those legal assistance services grants would be enormously important for Indian landowners to be able to achieve some kind of usable land consolidation and working together so that an estate plan can be put into effect. And, also, to negotiate this probate complexity that everybody has talked about.

Also, the family trust partnership corporation pilot projects that are identified in this piece of legislation are enormously important from the association's point of view. This legislation allows for 30 projects to be put in place. And in consultation with tribes and individual interests, or of individual Indians, the Secretary will develop regulations, guidelines, reporting requirements, and there will not be an impairment of the secretarial authority by this action.

As in all consensus, there are some negatives that we are aware that exist. The association disagrees with the term, as the Congressman from Samoa noted, that any time there is a sense that there is a determination about—with the definition of Indian, there is a concern, and that concern has been noted for the record. However, knowing that this is a bill that has been developed with consensus, we are aware that the eligible heir has—terminology has been drafted and is providing protection in the sense that, for those who are going to be outside of enrollment eligibility for their tribe can inherit and are eligible to inherit for the two degrees from consanguinity.

Another item that the association particularly would want to point to is the life estate for the non-Indian spouse or for the spouse as a life tenant. Under standard—generally standard probate, there is a one-third life estate and a one-third of revenue generated from the land. Here, I believe the life tenant of the spouse receives 100 percent.

Other items are noted in our testimony, and we would be willing to respond to those specifics. However, I will conclude my statements this morning, and compliment the Committee again for their consideration of this legislation. Thank you.

[The prepared statement of Ms. Giles follows:]

**Statement of Marcella Giles, Esq., Member,  
Indian Land Working Group**

Mr. Chairman, and members of the Committee, on behalf of the Indian Land Working Group, I would like to thank you for this opportunity to testify on S. 1721, the Indian Probate Reform Act of 2004.

The Indian Land Working Group (ILWG) commends the Committee for consideration of this important legislation. Although the ILWG does not support this legislation in its entirety, we support the intent and many of the provisions that address inheritance, management and use issues on allotted trust lands.

The ILWG is working to assure that lands remain in Indian ownership, and that these lands are used and managed properly. With this in mind, we would like to mention several provisions in S.1721 which are a positive change in addressing multiple ownership on trust allotments.

**Consolidation Agreements In Probate:** During probate, the decision maker may approve consolidation agreements involving exchanges and gifts of property already owned by the parties or on the decedent's inventory. Such agreements are made final by the probate order. Interests subject to a consolidation agreement cannot be taken under a probate purchase option in Section 207(p) which impacts interests that are less than 5% of a tract.

**Change in Consent requirement for Leasing:** 90% (rather than 100%) consent is required if there are 5% or less owners in a parcel.

**Probate Code and Legal Assistance Grants:** Grants may be given to tribes, legal services and landowner groups (that are tax exempt) to provide assistance to tribes, landowners, and Indian organizations to develop tribal codes and to engage in estate planning

**Family Trust/Partnership/Corporation Pilot Project:** The goal is to develop mechanisms for managing Indian lands held by multiple owners. In consultation with tribes and individual Indians, the secretary will develop up to thirty (30) pilot projects with regulations, guidelines, reporting requirements and revocation/suspension provisions. Secretarial authority is not impaired or diminished by this authority.

**ADDITIONAL SPECIFIC COMMENTS CONCERNING S. 1721 ARE AS FOLLOWS:**

1. The Indian Land Working Group opposes the definition changes made in S. 1721 in response to input provided by the Department of the Interior long after the stated deadline for submission of comments re S. 1721. No other sector was permitted to input changes or allowed to alter text subsequent to the deadline. Accordingly, a uniform standard has not been applied to all participants placing the non-governmental groups at a disadvantage by having their year-long processes nullified sub rosa.

The result of the disparate treatment is that Interior has been afforded a unilateral veto outside of but over work group processes on central issues that informed important provisions of S. 1721 as agreed upon by tribal representatives, legal service organizations, landowner group representatives and others. Interior's demand that certain categories of individuals not be entitled to the benefit of the term "Indian" (See Sec. 202) nullifies core work group assumptions about who would be entitled to be called "Indian" and who could hold property in trust.

The particulars of ILWG's concerns about the department's demanded changes are set forth in a narrative entitled, "Comments on Behalf of the Indian Land Working Group Re: DOI's Proposed Changes to S. 1721."

There is no valid justification for the department's failure to have officially "advocated" its position timely or at such a point that its views could be openly addressed by the work group. The department not only knew of work group processes, at various times, departmental personnel participated in them.

The net procedural effect of the department's position is to return the definition of "Indian" issue to where it was prior to May 2003 before work group processes earnestly began for all tribes but those in California. The department's position is even more restrictive than the definition of "Indian" contained in the initial S. 550 draft considered at the Albuquerque meeting of the work group which set the stage for subsequent activities.

The substantive effect is to resurrect damaging structures (non-Indians who hold land in trust) on the order of the previously-proposed and vigorously-opposed "non-Indian estate," "Indian heirship interest" or "passive trust interest" which, like the 2% rule, would impair land holder rights for the sole purpose of getting rid of federal duties without fixing fractionation.

One need look no farther than at the Chinooks to see the impact of the proposed system. The Chinooks experience restrictions but are not afforded general privileges due to their status as Indians who are not recognized but who nonetheless hold property in trust. The Chinooks are in land purgatory.

By refusing to permit individuals who are bloodline descendants of trust landowners to be called Indian, even those within the two degrees it would allow to inherit, Interior advocates a radical and immediate system of termination.

The concept of "eligible heir" simply creates Chinooks out of those so classified casting in jeopardy the ultimate retention of the land as a trust asset which in turn can impair tribal territorial integrity.

The definition of Indian in the 2000 ILCA amendments fast tracked the transfer of land interests to tribes by disqualifying owners' immediate families from full intestate inheritance as Indians. It deprives actual Indian landowners of the opportunity to benefit their issue as Indians holding land in trust. A hybrid is created: non-Indians who hold land in trust.

The effort to retain property in trust or restricted status while declaring the owner's "eligible heirs" but not Indians violates the department's well-documented position that "[T]he Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian." The bloodline descendants who are now classified as non-Indian (and affected tribes) can expect to be confronted by intense jurisdictional problems in the post-Oliphant and Montana Rule judicial climate.

The effect is duplicated under the 1721's devise provisions which permits the devise in trust to any "Indian" but allows other devisees to take as life estates or in fee by express action. By disqualifying landowner's immediate families from full inheritance in trust as Indians, ordinary expectations are thwarted making it necessary for actual Indian landowners to seek other avenues to benefit their families fully. Such measures include taking land out of trust which is destructive of tribal territorial integrity and jurisdiction. The "eligible heirs" are not as in the Lara case "non-member Indians." Such individuals are not classified as Indian at all.

It is currently the informal practice in some BIA regions to sit on applications for patents in fee for fractional interests or arbitrarily to deny them approval. It has even been proposed, recently, by certain departmental officials that legislation be sought prohibiting the department from issuing patents for fractional interests.

If challenged legally, standard principles of the law of real property and long-established Indian law principles would govern. Interior's subjective practices would be invalidated as arbitrary and capricious and an abuse of discretion because there is no objective codified authority for what they do. Restraints on alienation are generally disfavored in law. Such restraints as exist must be found in the allotment patent or certificate. Superimposition of additional restraints outside the organic documents is unlikely to pass legal muster.

The department's radical insistence upon impairing the status of lineal descendants is responsible for the landowner panic that followed the enactment of the 2000 ILCA amendments. Its continued insistence upon similar draconian definitions and limitations to lighten its load will fuel further patent applications, general widespread opposition and litigation. Trustees are not typically given the power to unilaterally walk away from trust obligations, especially, after having first made a mess of them.

Permitting inheritance in trust but prohibiting the individual who inherits to be called Indian sets such heirs and the department up for continuing legal problems, it is an incentive for equal protection challenges by non-Indians who are treated differently than the "eligible heirs" and does little to advance the cause of coherent land administration or prevent landowner flight to fee.

2. There are two instances of merger in the new changes to S. 1721: Sec. 207(a)(2)(C) and Sec. 207(a)(2)(D)(IV). The former is an intestate inheritance provision; the latter, is a provision of the single-heir rule. A tax exemption is a compensable interest. If extinguished by any method, here merger of the lesser estate (the beneficial interest) with the larger estate (the naked fee) thereby collapsing the trust, should not the decedent's estate must be compensated if a White Earth situation is to be avoided? While heirs have only expectancies, the decedent or the estate should be entitled to compensation for the elimination of a valuable protected property right held by it.
3. Use of the inventory at the time of the heirship determination as the sole basis for triggering application of the single-heir rule can easily lead to overlapping ownership on the order of that now found in the unrestored 2% interests.

It was acknowledged during the March 27 conference call that BIA is behind in its posting. Posting, it was said "should be caught up in two years." We have only experience by which to measure assurances of this type. In 1999, the BIA's probate backlog was to be eliminated in a couple of years. Despite expensive outsourcing, doubling probate manpower and the expenditure of huge sums, the backlog has more than doubled. It is therefore prudent to consider what circumstances are (a posting backlog) when considering this issue.

The circumstance that will present the problem is common. A probate is held. The owners (e.g. three children entitled to an undivided 1/3 each of the estate) are determined in a formal decision issued by a decision-maker. Once issued, the interests are deemed vested in the heirs as of the date of the decedent's death. At the time of the decision, all of the decedent's interests have not been posted to the estate.

This may result in a single-heir inheriting what appears to be a less than 5% interest under Sec. 207(a)(2)(D)(i)-(iii).

In this example, had all interests previously inherited by the decedent been properly posted, the amount would have exceeded the 5% threshold and the rule would not have been applied. Vesting principles entitle each of the three heirs to an undivided one-third of the estate as of the date of death but the provisions of the single-heir rule allow consideration only of the inventory at the time of the heirship determination.

Most often, those who argue the position that “there has to be a cutoff point” tend to think in terms of what they call de minimus interests. By doing so, they overlook the fact that a small interest involving a timber sale, a major regional shopping center in an upscale part of a major metropolitan area or a producing mineral interest can have significant value.

In the past, modifications under 43 CFR 4.272 ultimately would have caught up and corrected the deficient inventory. However, by restricting consideration to the “decedent’s estate inventory at the time of the heirship determination,” the usual corrective device is overridden. Last in time, therefore wins through posting negligence even though subsequent modifications show that a different disposition was warranted.

Does this quirky system result in the single-heir taking what was on the inventory and the additional interest when it is posted even though the full amount is 5% or over? Or does the single-heir take only what was listed on the inventory and the deprived true heir take the additional interest when it comes into the estate?

One of two things must be done to fix the problems created by the “inventory at the time of the heirship determination” restriction. Either eliminate the restriction or expressly make it subject to 43 CFR 4.272.

4. The single-heir provisions as they pertain to tribes in effect give tribes no choice under the rule except who the single-heir designate will be demonstrating paternalism not self-determination as the overarching ILCA policy.
5. In Sec. 207, ILWG agrees with:
  - The changed language describing right of representation. Prior S. 1721 language was legally and technically incorrect.
  - The joint tenancy devise presumption and its restriction to post-certification wills.
  - The changes in the intestate succession sequence. Prior S. 1712 language created a sequence without precedent in succession law.
  - The changes in the lapsed gift language for wills. Prior S. 1712 language was difficult to read and did not conform to time-tested Indian will anti-lapse provisions (43 CFR 4.261)
  - The new renunciation language with ratification provisions. The additions cure problems the ILWG previously reported to departmental personnel arising from the Board of Indian Appeals’ decision in the Estate of Gus Four Eyes and similar cases. The decisions were inconsistent with the majority of jurisdictions and at variance with beneficial departmental practice which aided retention of land in trust status and encouraged the use of disclaimers to prevent fractionation.
  - The land consolidation agreement language in probate, including the exemption of lands subject to consolidation agreements from the operation of Sec. 207(p)(5)(A)(2).
6. In Sec. 207, The ILWG disagrees with:
  - The intestate provision that assigns a full life estate with right to consume income in trust lands rather than a 1/2 life estate when they are children by another marriage.

Contemporary life spans could deprive children by other marriages of any benefit of inheritance in a parent’s estate. Modern uniform probate codes tend to establish shares based upon whether or not the surviving spouse is the parent of all the children to address this problem. (E.g. surviving spouse not parent of all the children takes one half and the children share the other half.)

As written, the provision would entitle the spouse life-tenant (if the decedent had issue) to 1/3 of the personal property on hand at death and a 100% life estate in the land. Based upon standard probate vesting rules, income derived from or associated with land after the date of death (the vesting point for the transfer of rights in the estate) goes to the person directed to receive the land under the rules of intestate succession. Here the spouse is given a 100% life estate in estate lands with the express right to consume income (described as the right to commit waste). The remaindermen would receive 2/3 of the cash on hand at death after payment of approved claims and nothing for the duration of the life estate. This effect appears not to be understood. He who has the rights to the real property has the right to receive the income



therefrom. A remainderman's rights of use and benefit are deferred until the expiration of the life estate.

- The use of the concept of "eligible heir" in the intestate provisions (207(a)) is to prevent individuals being called Indians so that the department can avoid performance of management and administrative duties. ILWG also opposes its use in other provisions including but not limited to the single-heir provision, the renunciation provisions and the purchase option in probate authorization.
- 207(b)(2) as written. It contains extensive cross references without narratively stating what particular provisions mean. Typical users will be unable to ascertain the meaning of the full provision. Laws that are not comprehensible are not usable by the intended user population.
- A forced spousal share inter alia may be based solely upon the fact of marriage for a stated period in Sec. 207(k)(2)(A)(iii). Such a provision overrides the testamentary freedom of the testator. It fails to take into account the fact that spousal omission from a will can be a conscious choice in the act of testation, that Indian lands are sole and separate property and that, among certain tribes, spouses as a coordinated act, traditionally benefit separate groups of lineal descendants rather than each other.
- The rules of interpretation that were boiler plated out of a high-end source without regard to application to the real world of Indian estates and probate: E.g.'s:

Sec. 207(i)(4) (birth out of wedlock) addresses a subject governed by a statute in existence since 1891 (25 USC 371).

Sec. 207(j)(3)(G) executory and future interests like (j)(5) life estates "pur autre vie" [for the life of another] are beyond exotic from the standpoint of Indian probate.

Sec. 207(j)(4) (joint obliges) the department doesn't probate secured debts so it would have no occasion to apply this provision in a land context.

7. ILWG has questions and concerns about specific features of the partition provision:
  - Persons within the pool of eligible purchasers are required to pay costs or provide a bond to cover the costs of serving and publishing notice. In cases where there is a lack of bids and the Secretary steps in to purchase the interest for a tribe, should waiver of costs be discretionary? If the applicant fails to pursue partition, upon what basis does the Secretary step into the applicant's shoes on behalf, possibly, of a third party, unless the object is to permit selective targeting of property. Individuals or tribes with no intention of follow through could initiate a partition against particular heirs and set them up for forced sale as an act of reprisal or political or personal enmity without expense or inconvenience to themselves.

Given the limited notice the department (who lobbied for the notice provisions) gives owners, the potential low-balling of values obtainable under Sec. 215 valuations by geographic unit and the lack of consequences to parties who trigger partitions with no consequence to themselves if they decide to back out and the odd feature that there can be grants and low cost loans to "successful bidders" (meaning that individuals and tribes may be encouraged to trigger partition by sale without having the finances in advance to consummate the transaction, the entire process is suspect.

- Sec. 205(d)(2)(D)(i)(III): geographic unit valuations (Sec. 215) could easily be worked to eliminate all situations in which owner consent would be required.
- 205(d)(2)(F)(i)(VII) and (H)(v): The right to a notice of the final appraisal and the right to pursue an appeal on value or partitionment is tied to receipt of comments from notices that are based upon "last known addresses," which are notoriously inaccurate, with address inquiry required by the department only in instances in which letters are returned undelivered with no requirement that efforts to locate addresses be certified. Huge amounts of allotted land was lost in Oklahoma by the use and mis-use of constructive notice (publication). People were unaware that there property was the subject of a partition proceeding. Repeat of this unfortunate experience should not occur.

Separately, tribes can be the third party beneficiary of partition proceedings in which there is no bid by eligible purchasers but they are not required, when they have such data (p. 20), to provide current addresses for notice purposes. There should be no prospect of gain in instances of data withholding.

8. ILWG has no objection to the owner-managed provisions but has a question regarding (g)(2). Does the phrase "otherwise using such interest in land" for purposes of jurisdiction include trespassers? [In (h)(1), the phrase "subsequent descent" should be changed to "subsequent inheritance." "Descent" is a term that applies to intestate succession.

9. Sec. 2212(b)(4): In connection with the mandate to minimize administrative costs and elimination of duplicate administrative proceedings, ILWG is informed that the special trustee has assigned a particular individual the responsibility of developing non-APA procedures to transfer property (funds and land) in lieu of regular probate processes. It is ILWG's further understanding that public land proceedings which often involve only permits and leases rather than actual ownership interests in land are not the subject of similar economies. The minimization effort, when combined with the elimination of requirements of procedural regulation to carry out particular provisions, appears to vest the department with ever greater unfettered discretion that, at most, will be governed by "manual" provisions which do not have the force and effect of law and are not subject to the same oversight or protective features associated with regulations.

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The CHAIRMAN. Thank you.  
Ms. Oshiro.

**STATEMENT OF LISA OSHIRO, DIRECTING ATTORNEY,  
CALIFORNIA INDIAN LEGAL SERVICES**

Ms. OSHIRO. Good morning, Chairman Pombo and distinguished members of the House Committee on Resources. On behalf of California Indian Legal Services and the California Indian community that we serve, I want to thank you for this opportunity to speak with you on S. 1721, the American Indian Probate Reform Act of 2004.

The issues addressed by the Indian Land Consolidation Act and the proposed amendments in S. 1721 are very important to preserve the Indian land base throughout Indian Country, and especially to protect the very limited Indian land base in California.

As Chairman Lyons had spoken to earlier, fractionation of allotments is not as significant in California as it is throughout the rest of Indian Country, but that is because there weren't as many reservations in existence at the time that the General Allotment Act was enacted. So you didn't have a lot of reservations being allotted. That was in 1887.

In 1891, we had the Mission Indian Relief Act that created some reservations for tribes in southern California, and the rancherias that exist throughout northern and central California today weren't created until much later, after the allotment period had ended. So we don't have many of those, a lot of allotment of reservation lands.

However, recognizing that there weren't many reservations, there were revisions to the General Allotment Act that provided for allotments on the public domain, and there were many individuals who received public domain allotments. And ironically, later, when an Indian agent was commissioned to study the homeless Indians in California and establish a rancheria system, those who held public domain allotments were overlooked because they had lands and the Federal Government did not establish a rancheria for their tribe. And that also later led to that tribe not being included on the list of federally recognized tribes.

So it is especially in relation to these public domain allottees that the definition in the Indian Land Consolidation Act has been very important.

The 2000 amendments, as has been alluded to, had created quite a bit of panic throughout Indian Country. Many Indian elders—

when I first began in Indian Legal Services in 1996, one of my first clients was an Indian elder who was very concerned about being able to pass on her trust interests to her children and grandchildren and have them pass it on to successive generations, as this was a symbol of this Indian legacy and how they had survived so many different periods that had been aimed at really trying to terminate and assimilate their peoples.

The definition that is contained in the proposed bill, we look to the definition of Indian as it also interplays with the definition of eligible heirs. And California Indian Legal Services jumped on the opportunity to be very intimately involved in drafting the language of the bill and negotiating various provisions, working with the Indian Land Working Group, the National Congress of American Indians, Indian tribes, and other organizations, and having sessions with the Senate Committee on Indian Affairs as well as BIA representatives to try to strike a balance and address all of our issues and concerns, and also take advantage of everyone's ideas, resources, and experience in putting together provisions that would slow fractionation, promote consolidation, and provide various estate planning services and tools to individual landowners, and I believe that this bill represents a lot of that work.

We do recognize that there were continuing negotiations and discussions, there was a markup in the Senate committee in January, another markup in April because we were continuing to have these discussions. And we have agreed within our informal task force and in our discussions with Senator Campbell's staff that this is a very, very important step for us to take, and we would like to see S. 1721 pass during this session. However, we will continue to work together within the task force, we hope to continue to work with Congress and the Department of the Interior to address the remaining outstanding issues, whether it be additional technical amendments or other substantive changes and enhancements to the bill.

So we commend this bill, we thank you for bringing it up for a hearing rather quickly after passage in the Senate, and we hope to continue to work with you to see its passage during this 108th Congress.

Thank you.

[The prepared statement of Ms. Oshiro follows:]

**Statement of Lisa C. Oshiro, Directing Attorney,  
California Indian Legal Services**

Chairman Pombo and distinguished members of the House Committee on Resources, on behalf of California Indian Legal Services, I thank you for this opportunity to address you on S. 1721, the American Indian Probate Reform Act of 2004, and other proposed amendments to the Indian Land Consolidation Act. The issues addressed by the Indian Land Consolidation Act and the proposed amendments in S. 1721 are very important to preserve the Indian land base throughout Indian Country and especially the very limited Indian land base in California.

*Introduction*

California Indian Legal Services (CILS), a law firm devoted exclusively to the representation of Indian people and Tribes, submits these comments based upon the collective experience of the firm over a period of thirty-seven years. CILS was incorporated in 1967 by public interest attorneys and California Indian leaders. When it was created, CILS became the first non-profit law firm in the history of the United States devoted exclusively to representing the rights of Indian tribes and individual Indians. Over the years, CILS has had remarkable successes—ranging from

the creation of the Native American Rights Fund to cases before the Supreme Court, the Ninth Circuit, other federal courts and state courts.

CILS has represented most of California's 107 federally recognized tribes during its existence and has served as counsel in many successful cases resulting in the restoration of improperly terminated California Indian rancherias. CILS has also represented many California Indian tribes in their legislative efforts, often successful, to restore their rightful status as recognized tribes. In addition, CILS has represented over 30,000 California Indians in matters such as Indian status, land status, and probate. As general counsel to the Advisory Council on California Indian Policy, CILS helped publish the most comprehensive report on the history and status of California Indians ever commissioned by the United States Congress.<sup>1</sup> Our historical role in California Indian affairs provides CILS with a clear perspective on how the probate provisions in the 2000 amendments to the Indian Land Consolidation Act would adversely impact California Indians, as well as on how S. 1721 eliminates those adverse impacts and would be beneficial for the California Indian community. Moreover, because we have a long history of representing tribes and individuals, CILS understands the sometimes competing nature of individual and tribal interests, and what policies strike a reasonable balance between such interests.

#### *The Indian Land and Natural Resource Base in California*

With 107 federally recognized tribes in California, one might expect the Indian land base in California to be substantial. However, the Indian land base in California is extremely small. The reservations and rancherias under the jurisdiction of the Pacific Region Office<sup>2</sup> consist of approximately 400,000 acres of land held in trust for the benefit of California Indian tribes. An additional 63,000 acres of public domain and reservation allotments are held in trust for the benefit of individual California Indians.<sup>3</sup> By contrast, the eighteen unratified treaties between the United States and California Indian tribes would have reserved approximately 8.5 million acres of Indian land in California.<sup>4</sup>

Some federally recognized tribes in California have no tribal land base whatsoever.<sup>5</sup> Many of the reservations and rancherias in California are extremely small: most are less than 500 acres; 22 are 100 acres or less and, of these, 16 are 50 acres or less; seven are 20 acres or less; five are under 10 acres; and four are under five acres.<sup>6</sup> Only 11 California Indian tribes have a land base of over 10,000 acres.<sup>7</sup> This lack of land stems, at least in part, from Congress' failure to ratify negotiated treaties, the termination of California Indian tribes under the California Rancheria Act of 1958, as amended, and their partial restoration.<sup>8</sup>

#### *Effect on Indian Elders in California*

California Indian elders are a remarkable group of survivors. Beyond the ravages of the Mission Period and the Gold Rush era, California Indians have survived the unrelenting antipathy, until recent times, of the State of California to its native people, as well as a federal government that seemed intent on terminating their status or refusing to recognize their existence. Despite some of the poorest treatment and the most sordid history native people in the United States have ever experienced, California Indian elders have managed to remain Indian, survive as members of communities they have kept alive and vibrant against all odds, and have kept almost one-half million acres of individual and tribal lands in trust. California Indian elders find themselves once again fighting to maintain their existence as Indians and fighting to keep their precious limited land base.

The California Indian community needs S. 1721 enacted into law rather than allowing the probate code and related provisions of the 2000 amendments to the Indian Land Consolidation Act to become effective. Serving many Tribes and elders,

<sup>1</sup> Congress commissioned exhaustive reports that detailed the tragic history and its remaining effects on California Indians. See, Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, September 1997.

<sup>2</sup> This does not include the three reservations that straddle the California/Arizona border, which are under the jurisdiction of the Phoenix Area Office. Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage—Summary, CY Ending December 31, 1996."

<sup>3</sup> Id.

<sup>4</sup> See Flushman and Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L.J. 390, 418 (1986) at 403-404.

<sup>5</sup> See Table 1 to the ACCIP Economic Development Report.

<sup>6</sup> Id.

<sup>7</sup> The ACCIP Trust and Natural Resources Report, at pp. 11-12.

<sup>8</sup> "The ACCIP Historical Overview Report: The Special Circumstances of California Indians," at p. 5,13; See, e.g., "The ACCIP Termination Report: The Continuing Destructive Effects of the Termination Policy on California Indians."

CILS is in a unique position to gauge the effect of the 2000 amendments on the California Indian elder population and we regret to report that the uncertainty occasioned by the 2000 amendments to the Indian Land Consolidation Act has created great distress among California Indian elders. No other recently enacted piece of federal legislation has caused as much anguish and fear among the American Indian community, especially our elders.

Since the passage of the 2000 amendments to the Indian Land Consolidation Act, Indian elders in California who possess interests in trust allotments have been under significant stress and discomfort—because the definition of “Indian” and limitations in the probate provisions of the 2000 amendments would have the effect of preventing them from leaving their lands to many of their children, grandchildren, and great-grandchildren in trust.

The 2000 amendments changed the definition of “Indian” to mean:

“any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of ‘Indian’ under a provision of Federal law if the Secretary determines that using such law’s definition of Indian is consistent with the purposes of this chapter.”

The above definition is especially troubling for current owners of off-reservation trust and restricted lands in California, generally public domain allotments, who are not members of federally recognized tribes, but are members of tribes which were terminated and are undertaking efforts to become restored; were previously recognized but not included on the Part 83 list of federally recognized tribes due to administrative oversight; or have petitioned for recognition and have either been waiting for many years on the ready list or are in other stages of processing their petitions for federal recognition with very limited resources.

While the definition of “Indian” in the 2000 amendments does not limit that term to members of any “federally recognized” tribe, but rather any “Indian tribe” which is more broadly defined to mean:

“any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;”

CILS has received many frantic calls from elders holding public domain allotments who were told by the Bureau of Indian Affairs following the passage of the 2000 amendments that their allotments would no longer be held in trust once the 2000 amendments became effective. Thus, while we would argue that these unrecognized tribes are “Indian communities for whose members the United States holds lands in trust,” there is apparent disagreement over such interpretation. There has also been a great amount of uncertainty about which limited definitions the Secretary would incorporate under the latter half of the 2000 definition of “Indian.”

The proposed definitions of “Indian” and “eligible heirs” in S. 1721 would provide both the Indian community and the Department of the Interior with greater certainty of who would qualify to hold and inherit interests in trust and restricted lands and would provide many California Indian elders with greater security in passing their interests to their lineal descendants in trust or restricted status.

#### *Proposed S. 1721 Referred to the House Committee on Resources*

Since its inception, CILS’ number one priority, as identified by the California Indian community, has been the preservation and enhancement of the Indian land base in California. This priority has led CILS to undertake significant efforts to ensure that some of the amendments to the Indian Land Consolidation Act enacted in 2000 be repealed or modified. To that end, CILS has worked closely with the Senate Committee on Indian Affairs since the 2nd Session of the 107th Congress, on S. 1721’s predecessor bill, S. 1340; and CILS has served as coordinators, along with organizations such as the Indian Land Working Group and the National Congress of American Indians, for an informal S. 1721 Task Force. The S. 1721 Task Force, a coalition representing tribal and individual Indian interests, has sought to fashion a fair and effective substitute bill in S. 1721 which balances the needs of individual landowners, Indian tribes, and the Department of the Interior.

CILS has assisted in coordinating numerous meetings, drafting sessions, discussion groups, community education forums and briefings. As a result of this significant effort by the national Indian community, the S. 1721 Task Force drafted and submitted a proposed substitute bill. Many of those provisions have made it into the current version of the bill with some provisions vastly improved through continued discussions and revisions and other provisions revised in attempts to strike a balance among the interests of Indian tribes, individual Indian landowners and the Department of the Interior.

There are times when we face what appear to be almost insurmountable challenges. Indian land fractionation has presented many problems and significant

challenges since the 1930s. Such challenges often require communities to come together and aggressively take on those challenges by making tough decisions which reflect a great deal of deliberation and compromise. Everyone agrees that the current level of fractionation of trust and restricted lands, and the associated management of the fractionated interests, pose massive problems for the owners of such interests (including Indian tribes), the Indian tribes with jurisdiction over such interests, and the Department of the Interior. S. 1721 has provided Indian Country with an opportunity for everyone to be a part of a solution which prevents further loss of trust and restricted lands, promotes the consolidation of fractionated interests in trust and restricted lands so that such lands and their resources may be protected and/or put to productive use for housing, schools, health clinics, cultural centers, economic development, and other community purposes. S. 1721 attempts to do all of these things while also respecting and protecting the rights and interests of individual landowners, and preserving and promoting the jurisdiction and sovereignty of Indian tribes.

The current version of S. 1721 reflects hundreds of hours of drafting, discussions and negotiations and an effort to bring together the collective knowledge, experience, resources, and vision of individual owners of trust and restricted interests, Indian tribes, tribal staff, consultants and advocates, Indian organizations, Congressional members and staff, and DOI officials and staff to provide solutions with immediate and long-term benefits throughout Indian Country. S. 1721 proposes important land consolidation measures which we would be happy to discuss separately in greater detail. However, the bill's probate code and related provisions were the focus of the California Indian community and thus CILS.

The centerpiece of S. 1721 is a more easily understood uniform federal probate code and its critical revision of the definition of "Indian" and addition of the definition of "eligible heirs." The proposed definition of "Indian" would include members and those eligible for membership in any Indian tribe and would also grandfather in all current owners of interests in trust or restricted lands as of the date of the enactment. The proposed definition of "eligible heirs" would include all Indians as well as their lineal descendants within two degrees of consanguinity. For Indian Country in general, these definitions working together would allow families to protect and preserve their trust and restricted lands for at least the current and next two generations while working together with their tribes to determine long-term plans and solutions for maintaining the trust and restricted status of those lands.

Due to the unique and special circumstances in California which are highlighted by the Advisory Council on California Indian Policy Reports, the proposed definition of "Indian" also includes a provision specifically applicable to the inheritance and ownership of trust and restricted lands in the State of California, providing for the continuing qualification of such owners as "Indian" for those purposes. Together with the proposed definition of "eligible heirs," successive generations of lineal descendants may continue to inherit and own interests in the limited trust and restricted lands in California.

These revisions and improvements to the uniform federal probate code will not slow fractionation or facilitate consolidation without appropriate estate planning and will drafting assistance. Thus, S. 1721 proposes solutions to assist the Department of the Interior in encouraging estate planning throughout Indian Country through the assistance of tribal governments, Indian landowner organizations and Indian legal services programs. Indian families would be provided with more estate planning tools and services so that they may better manage their families' trust and restricted lands.

California Indian elders deserve the comfort and the certainty that their precious trust lands will remain in their families and will be passed on to future generations. Moreover, they deserve the right to live out their lives secure in the knowledge that, whether by will or by intestate succession, their lands will remain protected and in trust status. We therefore urge the House Committee on Resources to act quickly during this 108th Congress and restore confidence and certainty to the trust probate process.

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The CHAIRMAN. Thank you, Ms. Oshiro.

Just to begin with you, if I may. It is my understanding that the majority of tribes, if not all of the California tribes, are in support of the legislation as it is currently written, even though you may have concerns about different parts of it. But in general, most of the tribes are in favor of it.

Ms. OSHIRO. Yes, that is correct, and California Indian Legal Services is strongly in support of the bill. The definition of Indian does contain a California specific provision that is beneficial to both federally recognized tribes as well as members of unrecognized tribes throughout California.

The CHAIRMAN. Well, thank you very much.

Ms. Giles, I know that in your written testimony there were certain provisions in the bill that you had concerns over.

Ms. GILES. Yes, sir.

The CHAIRMAN. But would it be safe to say that the working group generally supports the legislation?

The CHAIRMAN. The—when it comes to the specific issues that you've brought up, and I know I've been working with staff to try to address the issues that you brought up, that you submitted in your testimony, and I guess my question to you would be, would you prefer that the legislation pass and be signed into law as is, quickly? Because we have a lot of concerns that, if there are amendments made to the legislation as it's been worked out, that, in one sense, we kind of go back to square one and begin the consultation process again and making sure everybody is OK with whatever changes we make, and this ends up slipping a year or two off into the future. And I know there are a lot of people that have concerns with the further delay of this legislation.

Ms. GILES. Yes, sir. The Indian Land Working Group does not—has developed within its own association a consensus that there should not be a delay in the passage, the quick passage of this legislation. It is understandable that there needs to be consensus made for the passage of this legislation, and the four particular provisions that I noted in the testimony today have been near and dear to the heart of the Indian Land Working Group.

As I said, over a decade and a half, members of this association have worked intimately at the grass roots level with individual Indians who are totally impacted by this type of legislation. And they support those particular four provisions wholeheartedly. And the sense from the association is that the passage is a positive from the many, many years of work that this association has, in fact, in some times, initiated themselves.

The CHAIRMAN. Well, I will tell you, the both of you, that if we can move this and move it quickly and get it signed into law, I'm sure there will come the opportunity to have technical amendments, if necessary, in the future. And, as you know, right now there seems to be very broad and general consensus that this is the right way to go, and we need to move forward with that legislation.

But if there are issues that arise and we are successful in getting it signed into law, we do have to make technical amendments to it or we have to take another look at it. We will take advantage of that in the future and try to rectify any issues that come up because of some oversight that occurred or some issue that was identified at this hearing.

But thank you, thank both of you very much for your testimony. Again, thank you for your patience in waiting and in being part of the panel.

If there are any further discussions or any further questions that Members of the Committee have, they will be submitted to you in

writing and if you can answer those in writing so that they can be included as part of the hearing record.

Thank you very much. I thank all of the witnesses for their valuable testimony and my fellow Members of the Committee for their questions.

If there is no further business, I, again, thank the Members and the Committee and our witnesses.

The Committee now stands adjourned.

[Whereupon, at 12:02 p.m., the Committee was adjourned.]

