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BEFORE THE
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON
S. 1721, THE "AMERICAN INDIAN PROBATE REFORM ACT OF 2004"
June 23, 2004

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

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

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 Babbit 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 revest 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 revested 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.