

Prepared Statement of the Honorable John Berrey, Chairman

Quapaw Tribe of Oklahoma (O-Gah-Pah)

To the Subcommittee on Indian and Alaska Native Affairs

Oversight Hearing

“Implementing the *Cobell* Settlement: Missed Opportunities and Lessons Learned”

April 3, 2014

Introduction

Good afternoon Chairman Young, Ranking Member Hanabusa, my own Congressman Markwayne Mullin, and honorable members of the Subcommittee on Indian and Alaska Native Affairs.

My name is John Berrey and I am the Chairman of the Quapaw Tribe of Oklahoma (O-Gah-Pah, hereafter Tribe), located in far northeast Oklahoma.

I very much appreciate the invitation to appear before you today to discuss the Land Buy-Back Program for Tribal Nations (the Buy-Back Program), the \$1.9 billion initiative to help re-consolidate fractionated Indian lands across the country. As you know, this initiative was included in the *Cobell v. Salazar* settlement in ratified by Congress in 2010.

I want to thank you for holding this hearing: it is timely and aptly-named because I believe there are real opportunities being missed and, as we all know, this program is probably our last, best shot to re-consolidate Indian lands and make them economically viable again.

Major Objectives of the Buy-Back Program

The major objectives of the Buy-Back Program are to

- (1) Allow interested tribal members to receive payments for voluntarily selling their land at fair market value;

- (2) Reduce the number of fractionated interests in trust or restricted lands;
- (3) Structure acquisitions to maximize the number of tracts in which tribes gain a controlling ownership interest to unlock land for beneficial use or conservation, as determined by the applicable tribe; and
- (4) Deploy tribal resources such as realty and land management staff and officials to minimize the burdens to the Department of the Interior (the department).

Re-consolidating its Land Base a Top Priority of the Quapaw Tribe

An issue of major importance to the Tribe and its members is the consolidation in the Tribe of the many fractionated interests of our Indian lands. Over the past decade, the Tribe has developed and implemented one of the most sophisticated and successful Indian land consolidation programs in the country.

Since the Buy-Back Program was enacted, the Tribe has been working with department officials in its pursuit of a formal relationship from which to use Buy-Back Program funds to reduce fractionation and restore the Tribe's land base. We are somewhat frustrated, because, despite the success we have in the area of Indian land consolidation, to date we have not been allowed to participate in the program.

In early 2013, the Tribe submitted to the department a proposed Cooperative Agreement outlining how the Tribe's participation in the Buy-Back Program would benefit our tribal members and also demonstrate that significant land consolidation can occur if carried out properly. Various officials at the department were appreciative for the Tribe's submissions, and even commented that they had aided the department in preparing additional templates for the program.

After several meetings and conversations with department staff regarding the evolving contours and requirements of this historic land consolidation program, in March 2013, the Tribe submitted a revised Cooperative Agreement reflecting our understanding of what factors and elements the department would view favorably, leading hopefully to our involvement in the Buy-Back Program.

The department's response was not favorable. A Buy-Back Program official acknowledged the Tribe's strong desire to participate in the Program, but went on to note that

“if the Tribe is still interested in pursuing a cooperative agreement, I encourage the Tribe to submit a cooperative agreement application focusing on non-Superfund fractionated tracts and in light of the cooperative agreement guidelines published since March 2013.”

The department’s position is not only disappointing; it shows a fundamental misunderstanding of the Tar Creek site and the fact that large tracts of fractionated land within that site are not contaminated and are, in fact, being used for agricultural and other purposes. It has also caused us to question the overall openness and fairness of the program, as it is currently being structured.

Past Efforts and Tribal Acquisition of Individual Parcels

The only rationale the Tribe has been provided for being excluded from the Buy Back Program is that the department does not want it to buy fractionated land within the Tar Creek Superfund site (the Superfund site).

We do not know the basis for this position and, in fact, have tried without success to get the department to fully articulate its position. But it does not appear to be the true reason.

As explained below, the fact is the department routinely approves gift conveyances from restricted owner to restricted owner within the Superfund site, and the department also regularly approves probate conveyances to the Tribe from the estates of tribal members relative to restricted and trust parcels within the Superfund site.

For many years, the Tribe has sought to use the *Indian Land Consolidation Act* to acquire title to fractional interests in Indian land both within and outside the boundaries of the Superfund site. The Tribe has been successful in acquiring various parcels outside this site, but there currently are dozens of applications by tribal members who have already expressed their keen interest in selling their parcels at the site to the Tribe.

In its proposed Cooperative Agreement, the Tribe has offered to deploy its realty and other land-related offices and staff, made an extremely cost-effective proposal to use Buy-Back Program funds to consolidate fractional interests, and has offered to acquire these interests without asking for administrative funding authorized by

Congress in 2010.

There is no provision in law, or for that matter in the department's updated implementation program, that would prevent these transactions from being consummated.

The Tribe obtains conveyances of fractional interests in Indian land within the site through the probating of the estates of tribal members. As you know, the probate process is slow and does not keep pace with land fractionation. Further, and despite suggestions from the department that the Tribe look to non-Superfund site parcels in order to participate in the Buy-Back Program, the reality is that tribal members regularly obtain fractional interests in trust and restricted land within the Superfund site. This belies the department's position that these in-site parcels cannot be consolidated in the Tribe.

Lastly, the Tribe has met repeatedly with Bureau of Indian Affairs officials and expressed the Tribe's willingness to explore the possibility of mutually-acceptable language or other approaches to ensure the federal government incurs no new liability by virtue of these conveyances for purposes of land consolidation. These efforts have also failed.

I am not here to indict anyone, and I really have no information other than what I have mentioned about why the department seems disinterested in working with the Quapaw Tribe through a cooperative agreement. I do want to point out that realty matters can be very difficult for an Indian tribe to administer if the tribe has not had extensive experience in the area.

Tribes such as the Quapaw Tribe, with highly successful land consolidation programs, can serve as models to other tribes. The department should not let inclusion in the Buy-Back Program be guided by illegitimate reasons. The program should be open, and tribes, particularly those with a demonstrated record of accomplishments in the land consolidation area, should be allowed to participate.

In summary, in our experience, the department seems to have a private agenda concerning what tribes will be permitted to participate in the Buy-Back Program. In our case, the department is, for whatever reason, showing a lack of interest in working with a tribe that has been extremely successful in this area, and that could serve as a model for efficiently consolidating fractional interests in Indian land.

Recommendations to Ensure the Buy-Back Program Succeeds

As of January 2014, the department has agreed to Cooperative Agreements with five (5) Indian tribes: the Confederated Salish and Kootenai Tribes, the Northern Cheyenne Tribe, the Oglala Sioux Tribe, the Makah Indian Reservation, and the Rosebud Sioux Reservation.

I am happy for these tribes and am hopeful the Buy-Back Program is a success for them. At the same time, there are hundreds of tribes suffering from a fractionated land base and more must be done immediately to ensure this once-in-a-lifetime program works for the benefit of Indian people.

As you know, time is of the essence because authority for the Trust Land Consolidation Fund expires on December 8, 2020 --- 10 years after the date of final settlement of the *Claims Resolution Act*.

The National Congress of American Indians (NCAI) has approved a resolution urging changes be made to the land consolidation program and, most recently, has issued a letter to Interior Secretary Jewell urging the Buy-Back Program be opened up to additional tribes in an expeditious manner.

I have included copies of NCAI's resolution and NCAI President Cladoosby's letter to Secretary Jewell to this prepared statement.

As the department moves forward in implementing the Buy-Back Program, the Congress should re-consider two key issues in order to achieve the maximum value for the \$1.9 billion it has authorized:

1. The use of contracts and compacts under the *Indian Self-Determination and Education Assistance Act* to carry out the Program. These contracts are widely used in Indian Country, tribes have a thorough familiarity with them, and Buy-Back funding can be funneled to tribal communities through them.

As the Subcommittee knows, the use of ISDEAA contracts and compacts was hotly debated by the department and the Congress, with the department insisting they not be included in the final version of the *Cobell* settlement.

During post-enactment consultation sessions, tribes again raised the idea of using ISDEAA contracts and this suggestion was similarly rejected.

2. Congress should authorize the department to earn interest on the \$1.9 billion fund. Currently, the department is prohibited from seeking interest on this money and, in the process, is losing a valuable opportunity to augment the funding level contained in the original settlement.

3. Congress should encourage the department to re-evaluate its criteria for offering cooperative agreements to tribes, and should ensure that decisions are not being made arbitrarily.

The program should be open, especially to tribes such as ours that have made viable, cost-effective proposals, and that have a proven track record of actually accomplishing the goals of Indian land consolidation. In this regard, I encourage Congress to continue its oversight of the department's administration of this important program.

Conclusion

Given the opportunity, my Tribe will work with the department to acquire and consolidate fractional interests owned by tribal members.

In the process, we can demonstrate to like-minded tribes that the goals of the Buy-Back Program can be accomplished if the department and tribes work collaboratively and effectively.

Thank you for your consideration of my testimony. I am happy to answer any questions you might have.

Enclosures NCAI Resolution #PDX-11-041 (2011)
NCAI Letter to Secretary Jewell (December 18, 2013)



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #PDX-11-041

TITLE: Recommending Changes to the Indian Land Consolidation Program

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Department of the Interior (DOI) is seeking input from Indian country on how it should carry out the Indian Land Consolidation Program (ILCP) should the *Cobell* settlement gain final approval and the \$1.9 billion is made available for the ILCP; and

WHEREAS, although the Indian Land Consolidation Act allows DOI to enter into agreements with Indian tribes to carry out the ILCP, it does not allow DOI to enter into contracts or compacts with tribes to carry out the ILCP under P.L. 93-638, and tribes are concerned that unless these funds are contracted DOI will be unable to spend them within the 10 year period before the funds revert back to the U.S. Treasury; and

WHEREAS, NCAI supports requiring DOI to consult with tribes in planning, designing, and setting the priorities for the ILCP under the *Cobell* settlement and allowing Indian tribes to participate or assist in implementing the program; and

WHEREAS, in consultation sessions on the ILCP with DOI officials, tribal leaders made a number of recommendations on how the ILCP should be carried out should the *Cobell* settlement become final, including allowing Indian tribes to contract or compact ILCP functions under P.L. 93-638 or other mechanisms, eliminating liens on fractionated interests, and supporting estate planning efforts, among other recommendations.

NOW THEREFORE BE IT RESOLVED, that NCAI requests that DOI support, and Congress enact, an amendment to the Indian Land Consolidation Act, 25 U.S.C. § 2212(b)(3)(C), that would eliminate the prohibition on contracting the ILCP under P.L. 93-638 and instead make contracting or compacting mandatory at a tribes' request; and

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BE IT FURTHER RESOLVED, that NCAI requests that DOI incorporate the following changes and concepts in the ILCP program if or when the \$1.9 billion is made available to the ILCP under the *Cobell* settlement:

(A) allowing Indian tribes to contract or compact the ILCP at tribes' request under P.L. 93-638 or some other mechanism, which would include, among other aspects of the program, (i) prioritizing and identify tracts for consolidation and locating owners; (ii) procuring appraisals or valuations of fractionated interests, (iii) access to the Trust Asset and Accounting Management System (TAAMS), including financial resources to update and confirm the integrity of TAAMS data; and (iv) any other component of the ILCP that is not explicitly prohibited by federal law from being contracted or compacted;

(B) utilize existing authority, or seek additional authority from Congress, to eliminate the lien requirement for income generating fractionated interests and instead allow tribes to collect this income; and

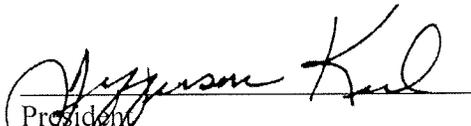
(C) support and fund estate planning efforts of Indian tribes and tribal organizations; and

BE IT FURTHER RESOLVED, that NCAI requests that if or when DOI develops a draft plan on how it will carry out the ILCP upon final approval of the *Cobell* settlement, that DOI consult with tribes on the draft plan before it is implemented; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2011 Annual Session of the National Congress of American Indians, held at the Oregon Convention Center in Portland, Oregon on October 30 – November 4, 2011, with a quorum present.


President

ATTEST:


Recording Secretary



NATIONAL CONGRESS OF AMERICAN INDIANS

December 18, 2013

Honorable Sally Jewell
Secretary of the Interior
1849 C Street, NW
Washington, D.C.

Re: Land Buy-Back Program and Tribal Cooperative Agreements

Dear Secretary Jewell:

I write today on behalf of the National Congress of American Indians regarding the fractionated land buy-back program approved by Congress in the Claims Resolution Act of 2010 (Public Law 111-291). As you know, under that Act a total of \$1.9 billion is available for purchasing fractional interests from willing individual Indian landowners for placement in trust for Indian tribes.

Never before has such a sum of money been made available to reverse the disastrous consequences of the Federal policy of allotment and restore a substantial portion of the tribal land base. But these funds are subject to several restrictions, not the least of which is the 10-year limitation of their availability. For that reason, affected tribes across the country have been urging the Department to proceed with implementing the program—over one year of this 10-year period has elapsed and the Department has just announced its first offers on two reservations. No interests have yet been purchased.

We realize that the Department has not been sitting by for the past year but has been consulting with tribes, formulating and planning its implementation strategy, and otherwise preparing for the buy-back undertaking. All of this was described by Deputy Assistant Secretary Lawrence Robert's recent testimony at a hearing before the Senate Committee on Indian Affairs on the implementation of the program and is evident from the Department's updated implementation plan. Yet it was also evident from the tribal government testimony that tribal leaders believe that many of their concerns have been ignored.

There are many aspects of the program that the Nation Congress of American Indians hopes to comment on and assist with as the Department proceeds with its rollout, there are two points we feel must be made now, at this relatively early stage.

First, it is apparent from the implementation plan¹ that the Department intends to substantially limit tribal participation in many of the most important functions of the program. We feel that it is imperative for the success of the program for the

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¹ See, also, the testimonies of Ivan Posey, Chairman of the Montana-Wyoming Tribal Leaders Council, and Grant Stafne of the Fort Peck Tribal Executive Board, Assiniboine and Sioux Tribes of the Fort Peck Reservation, at the hearing before the Senate Committee on Indian Affairs on December 11, 2013.

Department to adjust its course and open the program to greater tribal participation both in the program's decision-making and in the performance of functions and activities, including the performance of appraisals and other steps that are integral the process of purchasing of fractional interests.

Second, the Department should work with us in finding one or more ways for the \$1.9 billion to be invested and earn interest over the course of the remainder of the 10-year availability period. As Mr. Roberts himself noted in his testimony, "Although the Land Consolidation Fund is substantial, it is unlikely to have sufficient capital to purchase all fractional interests across Indian country." A sound investment strategy for \$1.9 billion over nine years will substantially increase the available capital.

Cooperative agreements with tribal governments are the key to addressing both of these matters. Many tribes have land programs that have been buying fractional interests for decades. But the cooperative agreements currently under consideration only permit tribes to participate in outreach, and do not appear to include valuation, or acquisition, or to permit tribes to hold funds in tribal accounts where they would earn interest until the transactions are completed. We are aware of a number of serious proposals for cooperative agreements with tribes that have to date been ignored.

In his recent Executive Order, President Obama said that

"...[T]he ability of tribal governments to determine how to build and sustain their own communities -- is necessary for successful and prospering communities. We further recognize that restoring tribal lands through appropriate means helps foster tribal self-determination."

We strongly believe that the Buy Back program will be far more successful if tribal governments are able to do the work in their own communities, and that a centralized federal program run by the Department of Interior will be much less successful. We urge the Program to engage with tribes and expand the scope of activities included in cooperative agreements.

Thank you for considering this request, and for all of your efforts on behalf of tribal governments and our Nation. We look forward to working with you as this critically important program unfolds.

Sincerely,



Brian Cladoosby

cc: Kevin Washburn, Assistant Secretary—Indian Affairs