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Testimony
Before the Committee on Resources
United States House of Representatives

Hearing on S.1721, "A bill to amend the Indian Land Consolidation Act to improve provisions relating to probate of trust and restricted land, and for other purposes."

June 23, 2004

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 “decendent’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 ½ 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 their 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.