TESTIMONY OF TEX G. HALL

PRESIDENT OF

THE NATIONAL CONGRESS OF AMERICAN INDIANS

ON S. 1340

BEFORE THE UNITED STATES SENATE

COMMITTEE ON INDIAN AFFAIRS

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Good morning, Mr. Chairman and Vice Chairman and Members of the Committee. My name is Tex Hall. I am the President of the National Congress of American Indians and the Chairman of the Mandan, Arikara & Hidatsa Nation. Thank you for inviting NCAI to testify before you on S. 1340, a bill to amend the Indian Land Consolidation Act. The National Congress of American Indians (NCAI) was established in 1944 and is the oldest, largest, and most representative national American Indian and Alaska Native tribal government organization. We appreciate the opportunity to participate on behalf of our Member Indian Nations in the legislative process of the United States Congress and to provide this Committee with our views.

HISTORY

The problem of fractionation and fragmentation of Indian land is rooted in a history that is familiar to members of this Committee. In the late 19th and early 20th century, the federal government began a push to acquire tribal land and assimilate Indian people through reservation Aallotment@ programs. The General Allotment Act of 1887 was the most broadly applicable of the allotment statutes, and between the years of 1887 and 1934 the tribes lost more than 90 million acres, nearly 2/3 of all reservation lands.

In 1934, Congress passed the Indian Reorganization Act of 1934 (IRA), in order to stop allotment and the abrupt decline in the economic, cultural and social well-being of Indian tribes caused by allotment. As noted by one of the IRA=s principal authors, Congressman Howard of Nebraska, Athe land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship.@(78 Cong. Rec. 11727-11728, 1934.)

The damage to the tribes and their members from allotment has been enormous, and the purpose of the Indian Land Consolidation Act is to specifically address some of these problems. First, because of the inheritance provisions in the allotment acts, the ownership of many of the trust allotments that have remained in trust status has become fractionated into hundreds or thousands of undivided interests. According to the BIA, the 56 million acres of trust and restricted land under its supervision are divided into 170,000 tracts of land with 350,000 Indian owners and, most important, 2 million different owner

interests. Fractionation has created an accounting nightmare for the federal government and enormous difficulties in putting the land to beneficial use. Second, the inheritance provisions also have created a situation where allotted land interests pass to heirs who are not members of Indian tribes, and the interest then is no longer in trust status. For many tribes far more Indian land passes out of trust than into trust each year through this process. This loss of trust land is a continuation of the disgraceful legacy of the allotment era, and compounds the jurisdictional and management difficulties in dealing with Indian land. Even more disgraceful is the fact that in many cases the heir is not aware that they are required to begin paying county taxes when the land goes out of trust, and after a period of one year, the county acquires the interest in tax foreclosure. The tribe provided all the services for 100 years and then after one year the county acquires the land interest as a complete windfall and the minerals or timber that reside on that land.

Finally, allotment left many tribes with scattered parcels and often rendered the tribal land base essentially unusable from a practical standpoint. It was not just the loss of land, but also the manner in which the remaining land was separated and divided which has created such ongoing hardship for the tribes:

> *The opening of the reservation in this fashion [under the allotment policy] had many ramifications other than the sheer loss of land. Much of the remaining Indian land estate was crippled. As any large rancher, miner, or timber executive can attest, effective resource management can best be achieved on a large, contiguous block of land in single ownership. The allotment program deprived most tribes of that opportunity. The tribal land ownership pattern became checkerboarded, with individual Indian, non-Indian, and corporate ownership interspersed.*

C. Wilkinson, American Indians, Time and the Law, at 20.

In sum Mr. Chairman, I do not think that I can overemphasize the importance of land consolidation in Indian country. Of the 90 million acres of tribal land lost through the allotment process, only about 8 percent have been reacquired in trust status since the IRA was passed sixty-five years ago. Still today, some tribes have no land base, many tribes have insufficient lands to support housing and self-government, and most tribal lands will not support economic development. Further improvements to the Indian Land Consolidation Act are vital to the future of Indian communities.

THE INDIAN LAND CONSOLIDATION ACT

Congress passed the Indian Land Consolidation Act (ILCA) in 1984 in order to address fractionation and provide for tribal land consolidation. ILCA authorized new powers for tribal land consolidation, the buying, selling and trading of fractional interests, and perhaps most importantly for our purposes Section 207 of the ILCA prevented the devise or descent of certain small interests in trust and restricted lands. Specifically, any interest that is 2% or less of the total acreage of a tract would not pass to a decedent=s heirs or devisees if the interest realized less than $100 in income during the preceding year. Such interests escheated to the reservation=s tribal government. Congress amended this provision the next year. The 1984 amendment altered the income generation test to take into account a five year earning-

history of each interest. The amendment also allowed an owner to prevent an interest=s escheat by devising the interest to another owner in the same parcel of land. The original version of section 207 of the Act was found to be an unconstitutional taking of property in 1987 (*Irving v. Hodel*). In 1997, the Supreme Court also ruled against the constitutionality of the 1984 version of Section 207 *(Youpee v. Babbitt* (1997)).

THE 2000 ILCA AMENDMENTS

The Supreme Court decisions were clearly correct in refusing to allow Congress to disenfranchise Indian landowners without compensation, but the decisions also eliminated the major mechanism contemplated in the Act for limiting the fractionation of Indian land. The purposes of the 2000 amendments were to create some new mechanisms for addressing fractionation.

Tribal Probate Codes and Descent and Distribution Rules

In particular, the 2000 amendments addressed tribal probate codes and both testate and intestate succession of Indian land. Section 206 was rewritten to remove procedural impediments that discouraged Indian tribes from enacting their own probate codes. In the absence of such tribal codes, the new version of section 207 provides uniform rules for the descent and distribution of interests in Indian lands. Before these new rules apply to any estates, the Secretary must provide the notice required by ' 207(g) and a one year waiting period must then pass. These new rules will only apply to the estate of those Indians owning trust property who die after that one year after the Secretary=s certification, and to date they have not yet taken effect.

Section 207 is intended to encourage the consolidation of interests and prevent the loss of trust or restricted land when it is inherited by non-Indians. The new rules are applicable to both testate (with a will) and intestate (no will) Indian estates. To prevent Indian lands from passing out of trust, non-Indian heirs will generally only receive a life estate in Indian lands. Because the non-Indian heir owns less than the full interest, a Aremainder interest@ is created, and this remainder interest must go to an Indian. If there are no such heirs, the remainder may be purchased by any Indian co-owner of the parcel. The proceeds of such a sale are made a part of the decedent=s estate. If no offer is made to purchase the parcel, the remainder interest passes to the tribe.

In some instances where the Indian owners of trust land may not have an Indian heir and the general rule would deprive them of the ability to devise more than a life estate to any of their heirs, the 2000 amendments provide an exception. They may devise an interest to either their Heirs of the First or Second Degree or Collateral Heirs of the First or Second Degree. Because these people are non-Indians, the interest would pass in fee, not in trust. There is also an option for these interests to be purchased by the tribe.

Finally, Section 207 is intended to address fractionation by limiting the way that Indian land passes as a Ajoint tenancy in common.@ If a person devises interests in the same parcel to more than one person, unless there is language in the will to the contrary, it is presumed to be a Ajoint tenancy with right of survivorship,@ meaning that that each of a decedent=s heirs share a common title, so the last surviving member of the group obtains the full interest as it was owned by the decedent. Any interest of less than 5% passing by intestate succession will also be held by the heirs with the Aright of survivorship.@ The

Secretary of Interior must certify that it has the capacity to track and manage interests that are held with the right of survivorship before this provision takes effect.

NCAI supported the 2000 ILCA amendments because we believed that overall they had a lot of very positive provisions in them. Without amendments to ILCA, the 2 million existing ownership interests in allotted Indian lands will continue to not grow exponentially and Indian land will continue to go out of trust status. At the time, we also recognized that there are a lot of difficult tradeoffs and that no bill could come to a perfect resolution. We relied on the assurances of the Committee that the 2000 amendments would not be the last word on this topic, but that we could expect to be able to come back with technical amendments to continue to correct and improve the statute as we gain more experience with it.

For that reason, we were also comforted by the provisions that ensured that the descent and distribution provisions would not take effect until one year after the Secretary provided notice to all Indian land owners. We believe that S. 1340 is taking the right approach in changing some parts of the 2000 amendments before they do take effect. In particular, concerns have been raised by Indian landowners that some provisions could limit their ability to devise their land to their heirs, whether they are Indian or not, and that the ability to devise land to your heirs is an inherent part of a property right that, under the U.S. Constitution, cannot be taken without compensation.

History has dealt this Committee an almost impossible hand B either allow Indian land to be devised out of trust and continue the unconscionable loss of Indian land, or restrict the rights of inheritance so that it causes undue harm to the owners. This is an issue that has been ignored, and we greatly respect the committees attempt to wrestle with this issue to find an appropriate accommodation. S. 1340 demonstrates that you are willing to continue working on this thorny issue. There isn=t going to be an easy obvious answer, but only tough choices that will respect tribal government and won=t cause undue harm to Indian landowners.

We recognize the need for the type of amendments that are proposed in S. 1340 regarding devise to non-Indian heirs under federal law and in a general sense we support them. We would like to hear from the other tribes and continue to talk with you about the specifics to see if there is a way to keep the land in trust status and under tribal jurisdiction. We also think it is important to simplify the provisions so that they will be more readily understandable for the Indian landowners, the tribes, and the BIA realty offices that must provide advice on these matters. Certainly these are complex property law issues, but our concern is that we must make the law clear and understandable to those who will be affected. Some clarifications on the effective date of both the new provisions and the 2000 Amendments also seems to be necessary.

We have very serious questions about the provisions of S. 1340 that place limitations on federal approval of tribal probate codes. One of the powers of tribal government is the power to control the devise and descent of property. This inherent tribal power is not constrained by the constitutional provisions that limit federal and state authority. We would like to discuss with the Committee whether it would consider amendments to the ILCA that would not undermine tribal jurisdiction over land, but instead would be carefully crafted to utilize inherent tribal authority and tribal probate law as a

mechanism to address the issues of fractionation and land loss. We should be reminded that the fundamental trust relationship is with the tribe as a whole and the allottees= interests exist solely because of their status as members of Indian tribes. In this instance, where the federal trustee has already violated its trust responsibilities to the tribe by allotting the land and is in a position where federal law must allow Indian land to move out of tribal control, the use of tribal probate law to restrict the inheritance of fractionated interests should be considered as a tool for tribal governments to consider in addressing the problems of fractionation and the hemorrhaging loss of Indian lands.

Pilot Program for the Acquisition of Fractional Interests

In 1994 the BIA started a consultation process to solicit input on how to address land fractionation. More than a majority of the individuals who participated indicated that they would be in favor of a program that allowed them to sell their fractionated interests for consolidation in the tribe. Interior=s FY 2000 budget included $5 million for this pilot project, and under ' 213, the Secretary is required to continue this project for three years and then report to Congress on the feasibility of expanding the program to provide individuals and greater tribal involvement.

If I have one point to make, it would be that this pilot program must be expanded and adequately funded. Failing to deal with land fractionation is like failing to fix a leaking roof. You may think you are saving money, but in the long run it will cost you plenty in both money and grief. We believe that the federal government must make the investment in land consolidation now in order to prevent land fractionation, and all of its attendant difficulties for both the federal government and tribal governments, from growing into an exponentially greater problem. For the FY 2003 budget, I believe that we should target $33 million dollars. I would note that $33 million is the amount that the Administration calculates that it spends on an annual basis to administer those highly fractionated interests that are of less value than the costs of administration. This investment of an equal amount would quickly repay itself in later years.

TRIBAL LAND CONSOLIDATION PROGRAMS

I would like to emphasize that the primary actor in Indian land consolidation is not the federal government, but the Indian Tribes who have developed land consolidation programs on their own initiative. Just as in every other area of Indian policy, federal efforts on land consolidation will only be are successful when they work in partnership with the tribal governments in a government-to-government relationship. Tribes have acquired hundreds of thousands of fractionated ownership interests in order to further their own land consolidation and land recovery goals, and every one of these transactions works to the benefit of the federal government.

The only way that fractionation is going to be addressed on the necessary scale is if tribes have ownership in the process and the federal government assists tribes with that effort. *Cobell* gives Congress the reason to get serious about this effort. We are asking for the development of a partnership between the federal government and tribal governments that will provide tribes with the tools and incentives to acquire fractionated interests and consolidate their lands.

We also believe that the Committee should consider amending S. 1340 to include a mechanism for tribes to partition non-Indian interests in Indian land that are held in common with the Indian owners. Tribes are acquiring fractionated interests because they want to use the underlying land for a purpose, to

build a school, or housing or for agriculture or any of a number of important purposes. But a tribe does not have a ready mechanism to acquire or partition the non-Indian interest that is not held in trust. The tribe may have 98% of the interests, but no mechanism to acquire the final 2% if they are in fee status.

Tribal programs would also benefit from lower interest rates on the loans, and other means of lowering the tribes= out-of-pocket expenses, freeing up resources for additional acquisitions. We are researching some ideas that would expand the efforts of tribal land consolidation programs, including:

1) Create a categorical exemption for NEPA either legislatively or through Interior regulation, in order to reduce the time and expense related to land transfers;

2) Provide tax-exempt bond financing to tribes to acquire lands for consolidation;

3) Loan program that provides federal funding to buy down the cost of a loan, thus buys down points on the interest rate; and

4) Develop a tax credit for turning in fractionated interests or other tax credit structure that would have incentives for owners of fractionated interests.

We believe that the best thing that can happen in the near future is two things 1) move a variation of S. 1340 on the issues that are ready for inclusion in the bill and are within the jurisdiction of this Committee, and 2) develop a collaboration between Interior, Congress and the tribes in creating new incentives for land consolidation that may take longer to develop or require the involvement of a broader range of Congressional committees. This second step could perhaps take the form of an amendment to ' 213 that would direct the Department of Interior to begin its study of coordination with tribal governments immediately.

We are also aware that the Department of the Interior is thinking of expanding its efforts in land consolidation. There are different issues and interests that tend to shape the land consolidation strategies of tribes versus the federal government. We need to understand these issues and interests in order to craft the best possible short-term and long-term strategies that will promote tribal land consolidation efforts and tribal trust assets management while reducing Interior=s management and administrative oversight and transferring the cost savings to further tribal land consolidation efforts or other trust services. We believe that allotment-by-allotment land acquisition and consolidation strategies that have the necessary funding and human resources will be necessary. We want to set up some talks with Interior and the Committee to explore these issues further.

UNEXERCISED RIGHTS OF REDEMPTION

We would also like to strongly endorse the provisions in S. 1340 that would allow Indian tribes to exercise a right of redemption for interests in Indian land that have passed out of trust that would be subject to a tax sale or tax foreclosure proceeding. As I noted above, the inheritance provisions allow allotted land to pass to non-Indians, meaning that for many tribes far more Indian land passes out of trust than into trust each year. In many cases the heir is not aware that they are required to begin paying county taxes when the land goes out of trust, and after a period of one year, the county acquires the interest in tax

foreclosure. The tribe provided all the services for 100 years and then after one year the county acquires the land interest as a complete windfall and the minerals or timber that reside on that land. This is a severe injustice and we are glad to see that S. 1340 has a provision to address it. We would like some clarification on the notification procedures to the tribe, and would also note that this provision is dependent on providing adequate resources for tribes to be able to exercise the right of redemption.

INDIAN PROBATE REFORM

We would also like to support the creation of a uniform Federal probate code for interests in Indian land, with the understanding that it would serve as a default only when the tribal government had not developed its own probate code. As the findings in S. 1340 outline, one of the major problems with the General Allotment Act is that it did not allow Indian allotment owners to provide for the disposition of their land, and it mandated that allotments would descend according to state law of intestate succession.

Once again we would ask the Committee to reach out to the tribes and consider their views on the specific provisions of the uniform Federal probate code proposed in S. 1340. NCAI has not adopted a resolution on these provisions and they raise a number of new issues, so we are interested in hearing more from the tribes. One thought that we have is that there is a general sense among many tribes that an allotment would pass to the lineal descendents of the original allottee, rather than to any unrelated heirs of a surviving spouse. We would like to discuss this and other specifics in more detail with tribal leaders and with the Committee.

CONCLUSION

Thank you for the opportunity of appearing before you today. We greatly appreciate the work of the Committee on Indian Affairs, and would like to thank you especially for your attention to this most important issue.