STATEMENT OF KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE JOINT HEARING OF THE HOUSE RESOURCES COMMITTEE AND SENATE COMMITTEE ON INDIAN AFFAIRS, ON S.1586, THE "INDIAN LAND CONSOLIDATION ACT OF 1999"

November 4, 1999

Good morning Chairman Young, Chairman Campbell and Members of the Committee. I am pleased to appear before you today to provide the Department's views on S.1586, a bill that will amend the Indian Land Consolidation Act to more fully address the problem of the fractionated ownership of Indian lands. Resolution of this issue is critical to the economic viability of Indian country and the successful implementation of the Department of the Interior's ongoing efforts to implement trust reform. I would like to thank the House and Senate Committees and their staffs for the efforts they have put forth to resolve this complex issue. The fact that this hearing is a joint hearing serves to underscore the importance of this issue and the commitment of Congress to resolve it.

## HISTORY

The origin of the fractionation problem has been documented many times. Although several treaties provided for the allotment of Indian land, the process became a nationwide policy in 1887 with enactment of the General Allotment Act (GAA). The GAA directed that tribal lands be divided into small parcels and given or "allotted" to individual Indians. The purpose was to accelerate the civilization of the Indians by making them private landowners and, ultimately, to assimilate them into society, at large. Many Indians sold their land, but few assimilated into the surrounding non-Indian communities, resulting in wide-spread homelessness and impoverishment for Indians. By the 1930s it was widely accepted that the GAA had, for the most part, failed. In 1934 Congress, in Section 1 of the Indian Reorganization Act, stopped the further allotment of tribal lands. A direct result of the GAA was the loss of over 100,000,000 acres of land from the Indian trust land base between 1887 and 1934. An indirect result was fractionated ownership of land allotments.

As originally envisioned by the drafters of the GAA, allotments would be held in trust by the United States for their Indian owners for no more than 25 years. At the end of the 25 years, the land would be conveyed in fee simple to its Indian owners. Many allottees died during the 25 year trust period. In addition, it became evident that many allottees continued to need federal protection. As a consequence, Congress enacted limited probate laws and authorized the President to extend the trust period for those individuals who were not competent to manage their lands. The presumption was, however, that at some point in the foreseeable future the lands would be conveyed to their Indian owners free of federal restrictions. As a consequence, Congress did not amend the probate laws even though it continued to extend the period of trust protection. As individuals died, their property descended to their heirs as undivided "fractional" interests in the allotment. In other words, if an Indian owning a 160 acre allotment died and had four heirs, the heirs did not inherit 40 acres each. Rather, they each inherited a 1/4th interest in the entire 160 acre allotment. As the years passed, fractionation has expanded exponentially to the point where there are hundreds of thousands of tiny fractional interests spread throughout Indian country.

The fractionated ownership of Indian lands is taxing the ability of the Department to administer and maintain records on Indian lands. Fractionated heirship also threatens the integrity and viability of the Department's trust funds management. The Department is charged by statute with maintaining Federal Indian land records on these hundreds of thousands of fractional interests and with probating the estates of every Indian individual who owns a fractional interest in an allotment, regardless of how small that interest may be. The Department also maintains Individual Indian Money (IIM) accounts to receive, distribute, and account for income received from these fractional interests. In many cases, the fractions are so small that the cost of administering the fractional interests and maintaining the IIM accounts far exceeds both their value plus any income derived therefrom.

## THE INDIAN LAND CONSOLIDATION ACT

In 1984, Congress attempted to address the fractionation problem with passage of the Indian Land Consolidation Act (ILCA). The ILCA authorized the buying, selling and trading of fractional interests but, most importantly, it provided for the escheat to the tribes of land ownership interests of less than 2 percent. Over 55,000 of the 2 percent-or-less fractional interests escheated since passage of the ILCA in 1984. However, the problem of fractionation continues to worsen and, in fact, since the Supreme Court declared the current escheat provision unconstitutional in Babbitt v. Youpee, 117 S.Ct. 727 (1997), is accelerating. This is because interests that would have escheated are now passing to the heirs and further fractionating, and because numerous estates will have to be reopened in order to revert the 55,000 escheated interests. The costs of maintaining heirship records and administering the land is inordinately expensive for the BIA. Approximately 50 - 75 percent ($33 million) of the BIA's realty budget goes to administering these fractional interests making funds unavailable for more productive investments in lands. Other programs such as trust funds management, forestry, range, transportation, and social services, are likewise adversely impacted. Utilization and/or conveyance of the fractionated property by the numerous owners is also difficult because of the need to secure the numerous consents which are required.

## ACTIONS BY THE DEPARTMENT

In 1994, my office distributed a consultation package to tribal leaders to address the issue of fractionation and followed it with a letter to owners of trust and restricted Indian lands. The package included a proposal in the form of draft legislation and invited comments and suggestions for alternatives to the concepts contained in the draft legislation. The letter to landowners was sent to more than 126,000 individuals. The landowners letter described the proposal and included a questionnaire. More than 12,000 persons, 90 percent of whom reported themselves as members of federally recognized tribes, responded in writing during 1995. Sixty-five percent (65 percent) of the respondents in the survey of landowners agreed with the basic concepts of consolidating small fractional interests in the tribes through an acquisition program and preventing and slowing further fractionation.

S. 1586

In order for any initiative to have a measurable impact on the fractionated heirship problem, it must have two major components – first, it must eliminate or consolidate the number of existing fractional interests and, second, it must prevent or substantially slow future fractionation. S.1586 accomplishes both of these objectives. S. 1586 provides an acquisition fund to eliminate existing fractional interests and contains limitations on the devise and descent of trust property that will materially slow the future fractionation of allotted lands. Savings from the cost of probating Indian estates alone justifies the cost of the acquisition program. The average value of a less than 2 percent fractional interest in allotted lands on twelve reservations studied by the General Accounting Office (GAO) in 1992 was estimated to be less than $200. Comparatively, upon the death of an Indian owner, it costs the BIA between $1,500 and $2,000 to probate the landowner's estate. Additional costs are borne by the Department's Office of Hearings and Appeals. In many cases, the simple fact of the matter is that it will be cheaper to simply acquire the interests than it will be to probate them, allow them to further fractionate, and to pass them on to more heirs, which in turn allows them to continue to fractionate.

FRACTIONATED HEIRSHIP PILOT PROJECT

In FY 1999, the Congress authorized a fractionated heirship pilot project and appropriated $5 million for that purpose. 34 tribes applied for the pilot. After reviewing the applications and examining such things as the severity of fractionation on the various reservations, the condition of the probate and realty records, the availability of appraisal data, and the tribe's willingness to contribute to the program, three tribes from Wisconsin were selected: Bad River, Lac Courte Oreilles, and Lac du Flambeau. All of these reservations have very old (1850s vintage) pre-GAA allotments. Approximately 85 percent of ALL of the interests on the reservations were less than 2 percent, and several 80 acre allotments had in excess of 1,000 owners. After meeting with the tribes, establishing procedures for determining value, how to make rapid payment to the landowners, and how to speed up the deed recording process, the project was initiated in April of this year.

Initially it was anticipated that notices would be sent to landowners and advertisements placed in local newspapers and perhaps notice of the project announced on local radio stations. However, the opportunity to sell fractional interests spread quickly by word of mouth and the BIA has been inundated with requests to sell interests. To date, over 8,000 interests have been purchased and over 4,000 acres have been returned to the tribes. Over 600 deeds (combining multiple sales of fractional interests into one document) have been recorded and the need for over 250 probates and new IIM accounts have been eliminated. With over $1 million in additional acquisitions currently being processed, the entire $5 million for the pilot project will likely be used to purchase additional fractional interests by February 2000. The success of the pilot project demonstrates not only that the number of fractional interests can be dramatically reduced through an acquisition program, but, more importantly, that there are significant numbers of individual Indians that are in the market to voluntarily dispose of these interests.

ECONOMIC VIABILITY OF INDIAN LAND

S. 1586 addresses one of the most serious ramifications of the fractionated state of Indian land ownership. Before the Secretary can lease land for purposes such as grazing, drilling, mining or rights of way, the owners of that land must approve the lease. In some cases under federal law, such as agriculture, a majority in interest of the owners must approve the lease. In others, such as oil and gas drilling, all owners must approve the lease before it can go forward to the Secretary. With scores or even hundreds of owners on a single allotment, potential lessees simply find it too burdensome or costly to locate and obtain the approval of all owners. As a result, land frequently goes unleased and the owners lose the economic benefit of their property.

S. 1586 would adopt a uniform standard for all leases, rights-of-way, sales of natural resources or similar transactions regardless of the use to which the property will be put. It would authorize the Secretary to approve such a transaction if it is supported by the owners of a majority of the interests in a parcel of land.

I would also like to bring SEC. 221. REAL ESTATE TRANSACTIONS INVOLVING NON-TRUST LANDS, to your attention. There has been considerable confusion and litigation about whether 25 U.S.C. §177 applies to lands acquired in fee by Tribes.

The Administration believes that Section 221, as proposed, should be amended to make it clear that §177 automatically attaches to lands that are purchased in fee by a Tribe if those lands are within the boundaries of its current reservation. Such a provision would greatly enhance the federal and tribal goal, evidenced by statutes such as 25 U.S.C. § 465, of rebuilding the Tribal land bases that were decimated by the allotment of Tribal lands. We believe that such a provision is consistent with the goals of the majority of Tribes, who generally are interested in preserving lands within reservation boundaries in Tribal ownership for the benefit of future generations. The right to sell, mortgage or otherwise dispose of interests in land that are outside of current reservation boundaries without Congressional or Secretarial approval will better enable Tribes to pursue economic development and self-sufficiency.

CONCLUSION

In 1997, the Administration submitted a draft bill that was introduced and hearings were held. Representatives of some of the allottees, principally the Indian Land Working Group, testified on that bill and also presented their own legislative proposal to Committee staff.

Following the hearing, a meeting was held with Senate Committee staff, the Administration and the Indian Land Working Group to discuss the two proposals. The Senate Committee staff then took the comments received at that meeting and drafted S.1586. The Committee staff has done a remarkable job in combining the best features of both proposals and are to be commended for their efforts. There will, no doubt, be concern expressed by some witnesses over the inclusion of an escheat provision in S.1586 and emphasis placed on the fact that the Supreme Court has twice ruled that the escheat provisions in the existing version of ILCA are unconstitutional. To that argument we quote from the final paragraph of the Supreme Court's opinion in Hodel v. Irving:

> There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. [Citation omitted.] It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interest by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe.

S.1586 was drafted in full awareness of and in response to the quoted language. S. 1586 specifically addresses defects that rendered the earlier versions of the ILCA unconstitutional. First, it requires that notice of the amendments be given to the allottees within six months of passage of the amendments and gives them a minimum of eighteen months to comply with the amendments. Second, it also has liberal provisions of the devise of property and does not totally prohibit the devise of less than 2 percent interests as the earlier versions of the ILCA did.

The Administration wholeheartedly supports passage of S.1586. We will submit a list of technical corrections and relatively minor suggestions to the Committee, shortly. Passage of S.1586 is, in fact, imperative if the current trust reform initiative is to succeed. Without a legislative resolution of the fractionation problem, the ever quickening growth of fractionation will outpace any efforts to implement meaningful trust reform.

Thank you for the opportunity to testify on this important piece of legislation. I will be happy to answer any questions you may have.