# MANDAN, HIDATSA & ARIKARA NATION

**Three Affiliated Tribes * Fort Berthold Indian Reservation**

Tribal Business Council

**Tex "Red Tipped Arrow" Hall**
**Office of the Chairman**


Good Afternoon Mr. Chairman and Members of the Subcommittee:

My name is Tex Hall and I am the Chairman of the Mandan, Hidatsa and Arikara Nation of North Dakota. I am also the Chairman of the Great Plains Tribal Chairmen's Association and the Coalition of Large Tribes. It is a pleasure to appear before you today.

As you know, the Land Buyback Program was enacted due to the settlement of the *Cobell v. Salazar* litigation. For many years, Indian people have known that the federal government was mismanaging our trust dollars, real property, and other non-monetary assets. We just did not know how to stop it. Finally, in 1996, my good friend, Eloise Cobell, and another group of brave Indian individuals had the courage to file suit against the United States for an accounting of our individual trust accounts. Through that litigation, we were finally given a partial opportunity to document the extent of that federal mismanagement.

Among the many examples of federal malfeasance that were presented to the Court was the U.S. Government's failure to address the inheritance and land ownership problems that it created by the passage and implementation of the General Allotment Act in 1887. This, as you may recall, was the federal statute which divided thousands of acres of Indian lands among various individual tribal members.

Because the federal government failed to arrive at a proper system for managing the inheritance of these allotted lands, some 150 tribes, my own included, now find themselves dealing with tens of thousands of individual trust parcels within the boundaries of our reservations which are owned by hundreds and in some cases even thousands of different individuals. Think about that for a moment, thousands of single parcels, scattered throughout our reservations, all of which have multiple owners and many of which are owned by well in excess of 100 different people. This situation is a nightmare.

According to DOI's own studies, 90% of those fractionated parcels are now located on just forty (40) reservations, including my MHA Nation. The chart contained in the DOI's Updated Buyback Implementation Plan, dated November 8, 2013, documents that roughly 33% of these fractionated interests are now located in the Great Plains/ Aberdeen Area, and around another 24% are located in the Billings Region of the BIA. Thus, my friend from Fort Peck and I


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are here representing the Tribes who collectively face well in excess of 50% of these problems on a daily basis. On my reservation alone, we have 3,024 fractionated tracts with 91,707 separate fractional interests. This is largely because many MHA members now have an interest in more than one fractionated track. It is also because, as a result of inter-tribal marriages, it is not uncommon for members of a given tribe to have a fractionated interest in lands on someone else's reservation.

Last week, I was honored to Chair a historic meeting of the tribal leaders of the Great Plains Tribal Chairmen's Association, the Montana-Wyoming Tribal Leaders Council and the Coalition of Large Tribes. The Tribes who are the members of these three organizations collectively represent in excess of 75% of the Plaintiffs in the Cobell litigation, and 25 of the 40 tribes most impacted by fractionation. Those 25 tribes have been discussing the Cobell Buyback program with DOI and with each other since it was first announced.

We all agree that the Buyback program is a wonderful and much needed initiative which was devised by some very well intended people. Unfortunately, virtually none of those people had any experience in acquiring or managing fractionated interests. They were Indian individuals, and/or lawyers with little experience in representing tribal governments, who only understood these problems from an academic perspective. So, while the buyback program was strongly supported by the 150 tribes most impacted by fractionation, it was also developed with virtually no tribal input.

I had the pleasure of talking with my friend Eloise Cobell prior to her death and she related that by the time that the Parties to the Cobell litigation were finally reaching an agreement, both sides were exhausted from thirteen plus years of aggressive litigation. During the settlement talks, their primary focus was directed at the total amount of money to be paid to the individual Plaintiffs under the other provisions of the Settlement and how those monies were going to be divided up. So, it is clear to me that while both sides agreed on the benefits of a land buyback program, little attention was paid to how that program would have to operate in real life. The Indian Land Consolidation Act (ILCA) was already in place and it appears to provide for tribal participation, so those involved apparently thought that it could provide an effective vehicle for the expenditure of the monies that were being placed in the Land Consolidation Fund.

It is equally clear that when the Cobell Settlement was finally presented to the Congress, its advocates were scared of changing one word in any of the documents for fear of stalling that settlement. This has been verified to me by one of our tribal lawyers who actually staffed that bill for Senate Indian Affairs Committee. The one person who foresaw many of the problems we are now encountering and tried to address them was Senator Barrasso of Wyoming. Senator Barrasso pointed out the need to amend the Indian Land Consolidation Act to

accommodate this new use in many of the same ways now proposed in the Daines and DeFazio bills.. Unfortunately, Senator Barrasso's suggestions were drowned out by those who were saying "let's just get it done." Thus, the Claims Settlement Act of 2010 was passed without a series of much needed and strongly advisable amendments to ILCA.

Luckily, the Court has left us an opening to make these corrections. If you examine the Settlement itself, you will see that it states that the U.S. shall distribute the Land Consolidation Fund:

> In accordance with the Land Consolidation Program authorized under 25 U.S.C. section 2201 et.seq. [ILCA], any other applicable legislation enacted pursuant to this agreement, and applicable provisions of this Agreement."

Because the Settlement itself does not require the use of Section 2201 as it existed at the time of the settlement, Congress clearly has the authority to amend ILCA to address the problems I am about to address:

**What Needs to be Changed?**

First, Congress needs to make it clear to the Administration that this is judgment money that belonging to those tribes who suffered the actual damages as a result of fractionation. As such, it should be generating interest for its owners. I and the other 25 Tribes at last week's meeting were thrilled that this position is advanced in the three separate pieces of legislation, H.R. 5020, introduced by Congressmen Daines; H.R. 4694, introduced by Congressman DeFazio; and S. 2387, introduced by Senator Walsh. Unfortunately, only one of the three bills, H.R. 5020, advanced by Congressman Daines, recognizes that this money was authorized to address the actual damages that various tribal communities have suffered. As a result, 90% of that money rightfully belongs to the 40 tribes listed on page 13 of DOI's November 8, 2013 Implementation Plan. And, the remainder belongs to the other 110 tribes who have suffered actual damages as a result of the General Allotment Act.

This is not general Indian money, it is money authorized to correct the problems that have been and still are actually occurring in certain tribal communities. We ask the members of this Committee to remember this very important distinction.

Second, Congressman Daines correctly suggests that, for this very reason, Interior should be directed to immediately and permanently transfer the sums that it itself has recommended to the Tribes on the November 8, 2013 list, or to obligate and place the funds belonging to those tribes who do not want to manage their own buy back accounts into separate trust accounts to be held in the name of their individual tribal owner. This solves two problems. First, the interest generated on the funds transferred to the tribes will be generated

through private banks and federally backed investment institutions, so it will not be coming from the U.S. Treasury and increasing the federal deficit. Second, it eliminates the need to spend those dollars in the ten year period provided for in the Settlement, because the funds will be considered obligated at the time of those transfers.

Third, the best way of insuring that these funds are managed properly is to eliminate the prohibition against the use of P.L. 93-638 for buyback implementation. By allowing the tribes to utilize P.L. 93-638 contracts, as all three bills suggest, and as the Tribes have been calling for since day one, we solve a multitude of problems. First, P.L. 93-638 allows the tribes to be compensated for the very real costs of negotiating their management agreements with the federal government. Second, it will allow the tribes to negotiate and manage their own purchases and limit Interior's role to just the non-contractible trust functions, approving the purchase price and transferring the title. This not only improves the effectiveness of the program, it also eliminates the need for a lot of the federal staffing. Third, it allows the Tribes to design their own programs.

Thus, if Congress passes properly worded legislation, the Tribes who chose to implement their programs using "638" will be able to design and manage their own buyback efforts, negotiate their own overhead costs, utilize the interest generated on their local tribal investment accounts to acquire fractionated interests that Interior is not allowing them to spend buyback dollars on currently. Tribes are being impeded from spending buyback dollars on improvements, rights of way, and fee parcels. This undermines the effective use of larger blocks of land. Tribes should be allowed to decide what interests they want and need to buy. While the Settlement limits administrative cost to 15%, that is 15% of the total in the Land Consolidation Fund, not 15% of the small amount that DOI is currently allowing for tribal advertising and public relations efforts while keeping the remainder for its own use.

On my reservation, we have numerous parcels which contain oil and gas. We have asked Interior to allow us to acquire certain surface only interests, because we need control of the surface to build roads, extend pipelines and take other steps necessary to enhance our tribal oil and gas income. Unfortunately, Interior has not yet agreed to allow those surface only acquisitions. In fact, Interior has limited tribal involvement to many of the tasks necessary to make these acquisitions. This is not only wrong, it is highly illogical. Interior, to its credit, has openly stated that it cannot complete this buyback effort without the tribes, but when we try to get totally involved, they assert that current ILCA provisions limit their ability to accept our offers. To see an example of how this policy leads to failure, consider the Tribe which has suffered the most damage as a result of fractionation, Pine Ridge. DOI forced them into an advertising and public relations only agreement, it managed the appraisals and it decided which parcels were and were not available to acquisition. It also limited the tribe to just less than 24

months to implement this program. As a result, Pine Ridge was only able to utilize less than 50% of the $ 125,427,372 that DOI itself said that the tribe was entitled to as a result of its damages.

One of the things that it is very important for the Committee to understand is that fractionation creates problems well beyond requiring DOI to manage an ever increasing number of trust accounts. It also slows and sometimes even curtails our tribal ability to build roads, install water lines, develop internet connections, and utilize large sections of our reservations for economic development. It also generates a sizable amount of work for BIA representatives when developments of this nature have to be done. Thus, I find it hard to understand why Interior has, to date, insisted on focusing its attention and mandates on total estate acquisitions and on controlling so much of the process.

Finally, something that is not addressed by any of the pending bills, but needs to be included in any legislation that is passed, is the need to allow the tribes to establish their own fair market value for these acquisitions. At the present time, Interior's only focus is on the use of appraisals to determine how much can be spent for a particular acquisition. Those appraisals do not take adequate account of the improvements which exist on many of the fractionated parcels, and they completely fail to take into consideration the benefits that an entire tribal community will obtain from acquiring certain parcels. The current Settlement states that Fair Market Value shall be determined In accordance with Section 2214 of ILCA. That provision states:

> The secretary may develop a system for establishing the fair market value of various types of land and improvements. Such system may include determinations of fair market value based on appropriate geographic units as determined by the Secretary. Such a system may govern the amounts offered for the purchase of interest in trust or restricted land under this chapter.

So, to put it simply, the Settlement does not direct the Secretary to apply any specific methodology. So to correct these problems, we are recommending that the Committee add a new subsection (b) to ILCA Section 2214 which reads something like this:

For purposes of a tribe's implementation of the Indian Land Consolidation Provisions of the Claims Settlement Act of 2010, the fair market value of a given acquisition shall be determined by a reasonable combination of the following factors:

1. The appraised value of the land and the improvements on the land;
2. The benefit of the acquisition to the tribe and the greater tribal community;
3. The average annual earrings of the land, and interests on the land;
4. The potential earnings from the land over the next ten years; and

5. Any other factors that the Secretary considers to be appropriate.

By applying these factors, we may not acquire as many fractionated interests, but we will be in a much better position to acquire those interests that are stifling our development. So, in short Mr. Chairman, I and the other impacted tribes are asking this Committee is to take the Daines bill, add our recommended changes, and pass it as quickly as possible because the clock on the buyback program is running.

Thank you for allowing me to appear here today. I will be happy to answer any questions that you may have.