Committee on Natural Resources

Subcommittee on Indian and Insular Affairs

Oversight Hearing

1324 Longworth House Office Building

January 30, 2024

10:15 a.m.

• *"Examining the Opportunities and Challenges of Land Consolidation in Indian Country"*

Questions from Rep. Westerman for Mr. Cris Stainbrook, President, Indian Land Tenure Foundation:

1. In your testimony, you mentioned the Indian Land Tenure Foundation's successes in implementing estate planning services for tribal members over the past 22 years.

a. Can you further elaborate on why in 2003 less than 7 percent of tribal members had written valid wills?

While there has been little specific research on why, the most common assumptions center on the lack of a cultural history of estate planning and will writing. Prior to the passage of the General Allotment Act (GAA) in 1887, assets of an Indian person largely passed to the heirs in accordance with the specific tribal custom. Specific land areas in individual ownership was extremely rare and were more often assignments by the tribes for use by family groups. The need for passing land assets and other assets did not arise legally until the allotments were issued through the GAA. Under the GAA, the federal government declared Indian landowners as incompetent to handle their land affairs. Having a will was a completely unknown to Indian people and, as an "incompetent," any will they may have had would have been deemed unlawful.

The early probates of Indian assets, including land allotments, were subject to the state codes where the land was located. Few Indian people understood the codes or had legal assistance to develop a will. In reaction to the Howard-Wheeler Act of 1934, the federal government developed a probate code for the division of land interests among heirs followed by the Bureau of Indian Affairs (BIA) writing wills for Indian trust assets, including land interest holders. The vast majority of BIA wills were written by non-legally trained individuals and simply followed the distribution structure in Department of Interior regulations. There was little reason to have a will unless the Indian person had some very large estate and could afford independent legal advice.

The passage of the Indian Land Consolidation Act (ILCA) of 1983 was the first significant effort to begin trying to stem the amount of fractionation of land title in the allotments. Several provisions in the ILCA drew the attention of Indian land interest holders for their negative effects, including the administrative taking of small interests. This resulted in the first real uptick of Indian wills being created by those who could afford legal assistance. Amendments to ILCA in 2000, led to another bump but also led to many allotments being taken out of trust status rather than passing through the federal probate code.

b. Which of these reasons still hold true today that Congress should take into consideration when legislating in this area?

Few of the issues discussed above are current impediments to estate planning for allotment interest holders. The largest one that still exists, particularly for the elderly, is the financial cost of legal services. In 2004, the BIA discontinued writing and storing wills for trust assets. The Indian trust land interest holders are therefore required to find legal services elsewhere. Complicating this further is the low number of attorneys trained in the will preparation under the American Indian Probate Reform Act (AIPRA) provisions.

2. Your testimony also mentioned the increase of interest from allotment owners and writing of wills after the American Indian Probate Reform Act was passed.

a. Has interest continued to increase among allotment owners?

Yes, the interest has continued because AIPRA contains provisions that are seen as onerous to many land interest owners. The only way for the land interest owners to avoid having the provisions, including forced sale at probate, implemented is to have a will designating heirs and the distribution of assets. Indian people know and understand the issues of further fractionation of land title. They are willing to have wills that stop, or at least reduce, the creation of new undivided interests. They also are willing to consider gift deeds (Transfer on Death Deeds if made available) to further prevent more fractionation.

The bottom line is, Indian people want to control their land assets and the outcome when they pass on.

b. Are there other considerations or factors that the Foundation has found that work to engage tribal members and Indian landowners in the estate planning process?

Sadly, yes. The request for legal services jumped dramatically during the COVID crisis. The legal service providers attempted to meet the demand through different means, including providing online services, and at one site providing a drive-through service with staff in full protective gear. Unfortunately, several clients were unable to execute their wills before contracting the virus and passing on.

Educating people on their options and what will occur if they choose the No Action option generally is sufficient to move people. However, it is a continual process. What might not be on their mind one day, will become urgent for them on a different day.

Word of mouth and continuity of services are also very important. After ILTF's providers serve a few initial clients in a community, word spreads but the providers need to be there regularly.

3. Please expand on the difficulties that the Indian Land Tenure Foundation faced while working with the Department to put in place a program that would address estate planning for individual Indians.

a. How can this be avoided in the future?

It seems the DOI and BIA keep looking for the silver bullet that will fix the issue of increasing fractionation of land title. The ILCA in 1983 included the escheat provision—small interests less than two percent and earning minimal revenue would be taken at probate by DOI and given over to the tribe. These were found to be unconstitutional takings.

The next attempt was the Land Buy-Back Pilot Project of the 1990s. It had some promise but also major flaws. It focused on purchasing very small (less than two percent) interests and returning the interest to the tribes, but it also put a lien on each purchase and needed to account for revenues against each small interest purchased. This did not reduce the BIA management costs significantly. Also, by not purchasing the larger interests from elderly willing sellers, the BIA missed the opportunity to do one transaction as opposed to many multiple transactions once an estate went through probate. The administration costs were prohibitive.

Next was AIPRA. This was a legislative attempt to change the probate outcomes for intestate estates and reduce fractionation by limitations on who could inherit interests. This was done with the "single heir rule" but also included provisions for "forced sale" at probate. These provisions are modestly successful, but will likely take 30 to 40 years to come close to ending fractionation, and will be effective only if Indian land interest holders do not write wills.

AIPRA also contained provisions for an estate planning/will writing pilot project. The Foundation was selected to do the pilot project. While it was successful serving clients and reducing fractionation in line with clients' wishes, we were told further program funding would not be available as, "The Department has fulfilled its responsibilities under the AIPRA legislation."

The most recent attempt came out of the Cobell Settlement, the Land Buy-Back Program (LBBP) for Native Nations. To their credit, DOI took lessons from the prior land buy-back pilot project, added much needed technology applications, and applied the program across a wide geography of Indian Country at a scale sufficient to have an impact. This was clearly their best effort to date. However, not every Indian land interest holder was willing to sell their interests. Whether it was their tie to their reservation, or it was Grandma's land, or it is their only source of regular income, some percentage of Indian people have no intention of selling at any price.

Our difficulty in working with DOI and BIA seemed to be that we were proposing a multi-pronged approach using all the tools in the toolbox to stem the tide of creating more undivided interests. The Foundation also came at the issue initially from the perspective of doing something to help Indian people control their assets, not to save the federal government administrative costs. Admittedly, we were naïve in thinking the trustee would have the beneficiaries' interest as a priority.

> b. Do you think the administrative costs that could be saved have increased or decreased since the Foundation suggested their program?

Clearly, it has increased from our first attempt in 2003 to undertake the project. At that time, the administrative cost of managing one undivided interest in Indian land was an average of $125 per year. This number was included by the Secretary's Office in testimony to the Senate Committee on Indian Affairs. In our most recent modeling (2017), the calculation of $168 per undivided interest per year was provided by the Secretary's Office. While we have not run the numbers since the Land Buy-Back Program was completed in November, 2023, it is likely that the total administrative costs are approximately the same but began rising literally the day the Buy-Back Program ended.