

U.S. HOUSE OF REPRESENTATIVES  
Committee on Natural Resources  
Subcommittee on Indian and Insular Affairs  
Hearing on  
“Examining the Opportunities and Challenges of Land Consolidation in Indian Country”  
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Statement of Cris Stainbrook, President of Indian Land Tenure Foundation

My thank you to Chair Hagerman and the members of this Subcommittee for the privilege and honor of inviting me to testify today. The topic today has been one of the Indian Land Tenure Foundation’s focus for the past twenty-two years.

**Introduction**

The Indian Land Tenure Foundation (ILTF) was created in 2002 through a community planning process that involved input from more than 1,200 Native people from throughout Indian Country. From the process emerged a consensus on the matters to be addressed that included the recovery to Indian ownership of the 90 million acres of reservation lands lost through the allotment processes, increased management and control of allotted land and the protection of off-reservation cultural and religious sites. At inception, the Foundation adopted the mission/goal statement of, *Land within the original boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest are in Indian ownership and management.*

ILTF has had a number of successes over the 21 years of operation, not the least of which has been assisting the Native Nations in the recovery of approximately 100,000 acres to their ownership. This has been accomplished through a combination of legal assistance, grants and loans from ILTF’s subsidiary CDFI, Indian Land Capital Company.

Early in ILTF’s work it became apparent that because of the history of federal probate of the estates of individual allotment holders, land was being lost to Indian ownership and millions of acres of the allotments were going underutilized by Indian people. The base cause being that the allotted land remained intact in trust status by the federal government but the title to the beneficial use was divided among the heirs of the decedent in undivided interests as prescribed by probate codes. The one way to avoid this prescribed division was for the interest holder to have a will directing the division of their assets. A quick survey conducted by the Foundation in 2003 showed that less than 7 percent of Indian people had written, valid wills. Therefore, the vast majority of trust allotment estates went through probate intestate and the number of undivided interests in trust allotments was growing exponentially and also included non-Indian interests due to marriage and non-Indian children heirs.

There have been a number of attempts by Congress and the Department of Interior to stem the growth of the number of undivided interests in trust allotments, the first being as far back as the 1934 Indian Reorganization Act that ended the allotment of reservation lands. The next real effort was the 1983 Indian Land Consolidation Act with a center point of escheating the undivided interests of less than 2

percent to the tribe at the time of probate. This provision was found to be an illegal taking and the courts ordered return of taken interest to the heirs. This effort did lead to the establishment of the Land Consolidation Pilot Project aimed at purchasing the interests of 2 percent or less on a limited number of reservations.

It was in this back drop that the ILTF Board concluded that in order for individual undivided interest holders to have control, management and use of their allotments, further title fractionation needed to be slowed and consolidation of interests needed to occur before probate through will writing and other mechanisms. The Foundation committed \$3 million of its own resources in 2003 to provide free estate planning services including the writing of wills to Indian land interest holders to explore whether interest consolidation and/or prevention of new interests could be accomplished.

*To be very clear, this work was undertaken to empower Indian people control their land interest assets, particularly as those assets were passed to their next generation.*

### **American Indian Probate Reform Act of 2004 and Estate Planning**

In 2003, Senate Bill 550 was introduced to address changes to the federal probate code affecting the Indian held trust land interests. The initial bill contained a number of provisions that, while addressing the needs and issues of DOI, did little to consider the interests and issues of Indian land interest holders and their families. The Senate Committee heard the comments from a number of us who testified at the hearing and asked that we all join a committee to address the concerns and re-write the bill. The committee consisted of a number of non-profit Indian groups, including ILTF, tribal leaders and BIA field staff. A re-drafted bill was submitted with more provisions addressing the concerns of Indian land interest holders. DOI reinstated a number of provisions and the American Indian Probate Reform Act of 2004 passed as an amendment to the Indian Consolidation Act.

Notable provisions in the Act were that a tribe could submit their own probate code for approval by the Secretary of Interior with a time limit for approval, there would be a pilot project of estate planning, and funding available to work with trust land interest co-owners to develop alternative management structures. The first provision was negated almost immediately by an Undersecretary of Interior sending a memorandum to the tribes saying that the Secretary would not review any tribal probate code until the Department had developed a model probate code. The co-owner alternative management model was not funded until 2015.

The Department of Interior as result initiated the Estate Planning Services Pilot Project with the dual objective of providing community outreach and legal training on the Act and evaluate the need for estate planning services in Indian Country. The Indian Land Tenure Foundation submitted a proposal to Interior to conduct the Pilot Project and was awarded the contract to start in September, 2005.

Two regional organizations—the Northwest Justice Project and the Dakota Plains Legal Services—were selected to provide the direct services to approximately 15 Reservations. The result was impressive given a new service and delivery approach was created with an ever-growing interest from allotment owners. Starting new program services on Indian reservations most often take time to build trust and awareness and the early recipients of those services provided some of the most effective marketing for

the program. The final outcome of just under 1,350 wills and 3,500 other estate documents were written in the eight month period. An additional 1,640 requests for services were pending when the contract ended. Eighty-four percent of the wills written resulted in consolidation or avoidance of the creation of new undivided interests. Further, gift deeds were used by many clients to pass their assets to heirs and avoid probate and the extended amount of time needed to get through the process. However, when a continuation of funding was sought, ILTF was informed that the requirements of AIPRA had been fulfilled.

Using numbers from the BIA at the close of the project, project costs of \$486,000 saved approximately \$3.75 million in future DOI administrative costs. More importantly, the project allowed clients to direct the passing of their assets and have a much needed service provided by the trustee.

ILTF has continued to seek funding for estate planning services for Indian land interest holders. Over the past 18 years, ILTF has patched together approximately \$5.5 million for estate planning from sources like the Office of Special Trustee, USDA and private foundations. ILTF is approaching 8,000 wills written and executed as well as nearly 11,000 gift deed transactions. But for the breaks in available funding that causes the loss of momentum with our contracted legal service providers, these numbers would be much higher.

Four years ago, ILTF went to a performance contract model with its legal services providers to test the model on a limited basis. The providers are paid on a scale based on the number and type of documents completed for clients. The model has worked particularly well with private legal firms.

As a final comment regarding estate planning, the DOI should consider using electronic wills and storage of original wills in the Lenexa, Kansas facility. Many of the original wills stored by clients cannot be located at the time of probate and results in the estate being processed as intestate. The process for electronic wills could be the same as that used by the federal court system.

### **Gift Deeds**

Gift deeds are a valuable tool for consolidating interests particularly if the interest holder has multiple interests on multiple reservations and heirs that are also on those reservations. Many, many trust land interest owners fit that description. The gift deed can be used to give land interests to the heirs who would receive the interests through probate or to any other person or entity, including the tribe. The gift deed process takes considerable time to go through and is currently a permanent transfer of the land interest.

While ILTF's legal services contractors have processed many of these, the number of requests has been increasing dramatically the last four years. The contractors report that clients would be more inclined to make gift deeds if the process were simplified and the gift recipient could be changed if circumstances changed. One significant change that could be made is the requirement for an appraisal on the property being gifted. Getting an appraisal or valuation for Indian land processes can be delayed by many months and even years. As the transaction is a gift without payment, ascertaining its monetary value seems superfluous.

The advantage of gift deeds over wills accrues primarily to the heirs or other gifted party. They will be the owners of the interest upon completion of the deed. Gift deeding all of an interest holders land interests and other trust assets will avoid the lengthy probate process.

## **Transfer on Death Deeds**

Transfer on Death Deeds (TDD) are now allowed and used in 30 states but not allowed on trust assets of Indian people, land interests and Individual Indian Monies Accounts (IIM). TDDs are used to streamline the process of transferring assets to heirs or others without having to go through the probate process. Most states allow the asset holder to identify a beneficiary for one or more of their assets to transfer immediately upon their death. The asset holder may also identify multiple beneficiaries to receive an asset, generally on separate forms. Many Indian people make use of TDDs in passing on their non-trust assets in states where TDDs are allowed.

This is a tool of estate planning that would seem to be a good fit for reducing administrative costs related to the probate process, particularly small IIM accounts and small undivided land interests. In the recent past BIA staff reported that there were approximately 50,000 IIM accounts with less than \$15 in the account and accruing less than \$1 per year. Prior to his retirement, Office of Hearings and Appeals Chief Judge, Earl Waites, estimated that OHA put these small accounts through an expedited probate process requiring approximately \$1,000 of OHA staff time.

While only a modest amount of consolidation may occur due to the use of TDD, the benefits to heirs in terms of timing of receiving the assets would be substantial.

## **Land Purchase for Consolidation**

The most recent example of buying out land interests for the purpose of reducing the number of undivided interests is the Land Buy-Back for Tribal Nations (LBBP). Arising in the settlement of the Cobell lawsuit, in my opinion this program was perhaps the most efficient and effective in reaching its goals of any federal government run program in my lifetime. While there were many outcomes intended and unintended that may prove to be problematic, it fulfilled its goals in consolidating interests from willing Indian land interest owners. Past programs concerning Indian land often involved involuntary participation.

In marked contrast to the processes of Estate Planning, Gift Deeds and Transfers on Death Deeds as outlined above, the outright purchase and transfer of the interest to the tribes ends the possibility of further fractionation of the undivided interest. The upside is, it begins to return the land to the communal ownership much as before the General Allotment Act of 1887. The downside is, those tribes that have not before had leasing or assignment programs for tribal member land usage will be playing catch up. Land management staff will need to expand rapidly.

The processes under the LBBP for appraisal and titling of the transactions set new standards for DOI and BIA. These efficiencies should not be lost. This Program demonstrated that new thinking and technology can be brought to bear within the DOI to more effectively serve their beneficiaries. And, while large volumes of undivided interests were consolidated into tribal interests, the ending of the program will allow fractionation of land titles to resume despite many willing sellers remaining available throughout Indian Country. While the \$30 million proposed in the FY2025 budget may keep the desired processes in place, it will not keep up with the rate of fractionating titles. ILTF's calculations would suggest that an annual allocation of \$60 million to \$100 million is necessary for an extended time to breakeven with

new interests to be purchased. This does not take into account the accelerating value of land throughout the country.

In short, the Land Purchase program is the most efficient program for reducing fractionated titles, but it is also the most expensive way to reduce fractionation as the land is being re-purchased. The cost of other approaches is likely that of providing services and administrative processing.

Even with the suggested amounts for a purchase program, it will not solve the fractionated title issue. It is very clear that many Indian people will not sell their land interests for any amount. Whether it is because "It is my Grandma's land and she said never to sell because it is all we have." Or, there is an expectation that minerals may be discovered on the allotment. Or, it is their touch point to their tribe and reservation. That is where the other approaches come into play.

### **Performance Contract**

In 2003 ILTF began trying to address the issue of fractionated title of trust allotments and how the land could work for Indian people rather than be used or leased out to non-Indians at less than market rate. The first foray into estate planning showed that the legal expenses would soon outstrip available resources and at the same time there would be administrative savings at several levels for DOI. We approached DOI in 2004 with a proposal to do a performance contract based on the number of fractional interests consolidated or avoided and the savings in administrative costs to DOI. ILTF was told it shouldn't be a performance contract but rather a grant project but funds weren't available. ILTF took the proposal back again in 2005 and again in 2018. The latter model was based on a Social Bond model of initial injection of private capital through bonds. ILTF was told it should be presented as a performance contract not a Social Impact Bond by the very same person we met with in 2004 who said it shouldn't performance contract!

ILTF has modelled the program for legal services to help Indian people with Estate Planning, Gift Deeds, Transfer on Death Deeds, and purchase of interests. The **attachment** is the summary of costs for the first 10 years of program services (\$696,781,426) and the savings of DOI administrative costs (in a range of \$7.5 billion to \$15.2 billion) over 40 years. The costs include an annual allocation of approximately \$60 million in purchases of undivided interests.

As you will note, the return on the cost of the purchase of land interest component is the lowest. As noted above, that is due to the actual purchase of land interests. The Transfer on Death Deeds is the highest return on dollars expended largely due to the absence of probate costs.

The provision of legal services covering any of the above possibilities and informing clients of their options at one time increases the efficiency of the service. It also allows for the client to decide which approach best fits their personal situation.

### **Conclusion**

ILTF would recommend that Congress and DOI consider approaching the issue from multiple approaches to have any hope of correcting what your predecessors created more than 100 years ago. Now would be the time to take action and benefit from the reduction of undivided interest from the Land Buy-Back Program as it will only grow from here. The Foundation will continue to work on this issue as well but as would be expected, the ILTF focus will be on serving the interests of the Native Nations and individual Indian land interest owners.

If ILTF can provide any further information or input, please don't hesitate to contact me.

Thank you for the opportunity to provide these comments to the Subcommittee.

## Attachment

### PERFORMANCE CONTRACT FOR INDIAN LAND TITLE CONSOLIDATION SUMMARY

	Total Program Costs (10 years)		Total DOI Savings	Net DOI Savings (40 yrs)	Net savings /Prog Cost
<b>Estate Planning/Will Writing</b>	\$10,309,323	low	\$469,463,093	\$459,153,770	44.5
		high	\$1,408,389,280	\$1,398,079,957	135.6
<b>Gift Deeds</b>	\$12,324,788	low	\$1,421,103,486	\$1,408,778,697	114.3
		high	\$2,811,369,696	\$2,799,044,908	227.1
<b>Land Interest Purchases</b>	\$652,397,688	low	\$2,926,983,474	\$2,274,585,785	3.5
		high	\$4,953,054,450	\$4,300,656,762	6.6
<b>Transfer on Death Deeds</b>	\$21,749,626	low	\$3,423,909,615	\$3,402,159,988	156.4
		high	\$6,765,603,239	\$6,743,853,613	310.1
<b>Combined Program</b>	\$696,781,426	low	\$8,241,459,667	\$7,544,678,241	10.8
		high	\$15,938,416,665	\$15,241,635,239	21.9

low= 3 heirs per interest holder

high= 6 heirs per interest holder