

Testimony of Douglas Nash, Director

Institute for Indian Estate Planning and Probate

Follow up Hearing on Backlogs at the Department of Interior

May 22, 2008

Mr. Chairman, members of the Committee, my name is Douglas Nash. I am the Director of the Institute for Indian Estate Planning and Probate at Seattle University School of Law (<http://www.indianwills.org>). The Institute is a project of the Indian Land Tenure Foundation which is a non-profit corporation in Little Canada, Minnesota (www.indianlandtenure.org). I appreciate the opportunity to participate in the follow-up session to the October, 2007, hearing on the issue of probate and backlogs within the Bureau of Indian Affairs.

I. PROBATE BACKLOG

From anecdotal evidence and personal experience, I believe that little has changed since the last hearing about eight months ago - at least in terms of the backlogs that plague the probate process. It is my prediction that little progress will be realized in the future unless the Bureau of Indian Affairs and/or Congress take some decisive steps to support the mechanisms created by AIPRA to proactively address and reduce the fractionation of trust lands.

The backlog in the probate of Indian estates is a multi-faceted, systemic problem with one common denominator, fractionated ownership of trust lands. The sheer number fractionated interests, combined with the current and outstanding historic probates, the

complexity of those probates as measured by the number of undivided interests held by each individual decedent, the lack of a central and robust LTRO record system that would support timely and accurate multi-jurisdictional title reports, and finally, the lack of estate planning and buy back resources which have proven success in reducing fractionation and removing interests from the probate process entirely. All of these factors contribute to the backlogs in probate now and the continuation of backlogs in the future.

The American Indian Probate Reform Act (AIPRA) is designed and intended to address the issue of fractionation through intestate succession. If fully implemented and resourced, the Act will substantially and significantly reduce fractionation given appropriate time. There are no quick fixes to address an issue that has evolved and grown exponentially for over 120 years. The Act's Intestacy laws will stop the further fractionation of very small interests, those less than 5%. However, the Act will continue to fractionate all lands greater than 5% until the highly fractionated threshold of 5% is reached. The new interests will require additional management resources and contribute to the continuation of the probate backlog.

Hundreds of thousands of new interests and owners will be created by the Act without intervention of the estate planning and buy back programs authorized by the Act. The Act contains specific provisions and authorizations for estate planning and buy back programs which reduce fractionation and promote reconsolidation of trust lands. Funding for these programs have been stalled and stymied.

I know this as Director of The Institute for Indian Estate Planning and Probate. We designed and administered a program under a one year Estate Planning Pilot Project Contract from Interior awarded in the fall of 2005 and in the amount of \$519,000.00.

The Pilot Project's purpose was to determine if there was a need for estate planning of trust lands and if so, would estate planning reduce fractionation of trust lands. The answer to both was unequivocally yes.

The pilot project provided full time estate planning services to selected tribes in Washington and all tribes in South Dakota utilizing four specially trained legal service attorneys and two legal service paralegals. The Pilot ended in September, 2006 and an extension of contract for unspent funds was denied. For reasons unknown to us, a few within the BIA have characterized the results as having a "neutral to negative" effect on fractionation. This is clearly contrary to the BIA's own auditor report, our statistical findings, and our experience with other projects we have operated since 2004. After completion of the Pilot, a BIA auditor reviewed client files developed in the course of the pilot project, with appropriate safeguards in place to protect confidentiality.

The BIA auditor concluded that 83.5% of the pilot project wills reduced fractionation. Will drafting not only prevented further fractionation of small interests, but stopped the fractionation of thousands of new interests that would have otherwise been created under AIPRA's intestacy rules. Under the Pilot, 2,600 trust land interests were transferred by will to a single heir or as joint tenancy with a right of survivorship which vests title in only the last survivor. Of these 2,600 interests, 780 interests were greater than 5% and AIPRA's intestacy laws would have further fractionated these into 4,640 new interests and heirs. 100% of Pilot Project's inter vivos instruments, such as gift deeds, stopped fractionation. Equally significant, 519 interests were permanently removed from any future probate proceeding through Pilot conveyances to tribes or buy back programs, saving the Bureau of Indian Affairs substantial dollars in what otherwise

would have been the continuation of administrative, probate and management costs.

These results are from just one program providing services full time for 9 months and for under \$500,000.

Our Institute is the only entity attempting to provide estate planning legal services to Indian people on a national basis. We develop programs and oversee projects in several states, using a number of different models, based upon available funds. Our programs provide estate planning services to Indian people at no cost. We currently have four projects in operation that deliver very limited estate planning services on approximately 20 reservations in six states and these projects are funded by private foundations and tribes. Adequate funding of estate planning will address and eliminate fractionation. Funding is the only obstacle to the expansion of our current projects and the development of new projects. We have resolutions from numerous tribes as well as tribal organizations in support of our work and tribes requesting services but who are waiting until additional funding is secured. Having substantial and long-term funding commitments from the BIA or Congress will greatly facilitate the delivery of estate planning services, and as a result, successfully stem the tide of fractionation and reduce the backlogs in probate.

Our projects utilize a number of different models designed to fit both needs of the communities and the private funding limitations we face. These include the use of specially trained, law student interns who are paid to work on reservations over the summer months; law student externs who receive college credit in lieu of a salary; contracting with legal services programs and training legal services attorneys to work exclusively on estate planning issues for tribal members; a law school clinical program at

Seattle University School of Law; paralegal providing services under appropriate supervision; and an evolving volunteer pro bono program. All project personnel are trained to provide community education on AIPRA, fractionation and land tenure issues, as well as offer clients alternatives with regard to the disposition of their interests in trust land – alternatives that minimize or eliminate further fractionation or, in some cases avoid probate all together. Testamentary transfers include leaving whole interests to individual heirs, leaving interests to multiple heirs as joint tenants with a right of survivorship, leaving other assets in lieu of land to some heirs and developing consolidation agreements. Project personnel also provide information and assistance with life time transfers, such as gift deeds and sales which eliminate the need for probate entirely.

The purpose and intent of AIPRA is thwarted without estate planning services and land consolidation options authorized under the Act. Estate planning services cannot be provided without adequate funding from the BIA or alternately, from appropriations authorized under the Act. Section 2206(f)(4). Unless these services are provided, the benefits that are contained within AIPRA will not be realized and backlogs will continue to increase.

II. WILL STORAGE

When the BIA announced that it would no longer draft wills, it simultaneously announced that it would no longer store wills for tribal members as had been their previous practice for many decades. Withdrawal of will storage services has a significant impact on probate backlogs. A thoughtful estate plan to reduce fractionation is worthless

if the family cannot find the will after death and the Bureau has no record of its existence. Additional time is spent in federal probate proceedings when judges must determine the legal sufficiency of a copy submitted when the original cannot be found.

Our project personnel counsel clients about safeguarding and storing originals of wills and providing copies to appropriate individuals. Inevitably, some wills will be lost, destroyed or otherwise unavailable at the time of the decedent's death. Delays in probate will be encountered as a result. Challenges to intestate proceedings in cases where family or friends recall the deceased having done a will are likely to increase, as will arguments for or against uncertified copies. Each will consume time and therefore, expand costs for the probate. Storing Indian wills at the local BIA agency marries well with that same agency's duty to prepare the probate package for hearing. Any additional burden, if any, of will storage would be offset by the time and costs encountered as a result of not providing the service. We encourage reconsideration of the decision of the BIA to not house wills

III. TECHNICAL AMENDMENTS

We have had an opportunity to talk with committee staff and review additional technical amendments currently in Senate draft form (S. 2087). We believe the changes proposed will clarify important provisions of AIPRA and further the effective implementation of the Act and reduce potential problems and claims arising from inaction. None of the proposed amendments alter the Acts provisions in a way that would increase the expense of implementation or administration of the Act.

There are several important changes to the Act under this floor draft bill. To be brief, I will only highlight two of the proposed issues and reasoning for change. 25 U.S.C. §2201(7) defines lands to include any permanent fixture attached. There is no differentiation between lands held by the Secretary in trust for the tribe or the individual. The result is, at worst, merger of HUD and Mutual Help Homes onto tribal trust lands contrary to existing federal lending agreements and contracts. At best, the existing language creates a gray area that the probate courts will inevitably have to decide – what is the nature of these homes. The amendment would remove the 2201(7) definition and provide an intestate provision for distribution under 25 U.S.C. § 2206 for those homes where the decedent has an ownership interest in the underlying land. Existing federal and tribal contracts, as well as tribal housing codes would be unaffected for those homes tribal trust lands.

Purchase options at probate, 25 U.S.C. § 2206(o), is a consolidation mechanism of the Act where a co-owner, heir or the tribe can request to purchase an interest in a parcel during the probate process. For interests greater than 5% or any interest passing by a will, consent of the putative heir is required. For interests less than 5% passing under intestacy, no consent of the heir is required for sale unless the putative heir lives on that parcel at the time of death. The Act currently measures these interests, not as the interest in probate of the decedent, but as the future expectancy of the heir. The result is that large trust interests of the decedent would be open to forced sale under the provisions of the Act. A simple scenario is an individual dying intestate with a 20% interest with five children. The Act's intestacy rules will fractionate this large interest, giving 4% interest to each child or the child's estate; and then, the same Act measures the putative

heir's unvested land interests at probate for sale without consent at probate. The amendment corrects the Act to measure only the interest of the decedents' at probate, and remove the potential for numerous property and due process claims that would otherwise arise.

IV. CONCLUSION

I would like to thank you Mr. Chairman, and the committee, for the opportunity to share this information in testimony today and for your interest in this subject and this Act which is critically important to many across Indian Country. We would be happy to provide any additional information that we have that would be of interest to the Committee.

Thank you..