

United States Senate Committee on Indian Affairs
(AIPRA Testimony)

Statement of
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Good afternoon, Chairman Akaka and distinguished members of the Committee:

My name is Sharon Redthunder and I am Acting Director of the Indian Land Working Group. On behalf of ILWG, thank you for the opportunity to participate in this hearing. ILWG was formed in 1991 to assist Tribes and individual Indians with land-ownership and related issues. In 2004, ILWG worked closely with Congress when AIPRA was enacted. For the past six years, ILWG has devoted major portions of our annual conferences to issues related to the implementation of AIPRA. It has been our experience that individual Indian allottees, those at the grassroots level, turn to ILWG for assistance when probate processes or tasks become confusing and complicated. Also, BIA often has as many questions for us as landowners do. We support the Committee's initiative to seek clarity and consistency to AIPRA procedures.

ILWG's support to allottees has produced an overwhelming amount of anecdotal evidence that shows AIPRA is being implemented with many diverse procedures. To this end, ILWG has compiled recommendations for the BIA that we believe will facilitate consistent procedures for probates of Indian land under AIPRA. The major tasks associated with AIPRA fall into five categories:(1) access to data to include land records, prior probates, rights of way and leasing records to facilitate will writing and ensure proper decision making occurs, (2) appraisals, (3) timely notice of pending probates, (4) will writing, and (5) consequences of vague terminology. Moreover, specific issues exist such as permanent improvements, tribal code development, and use of Geographic Information Systems (GIS) to provide analysis at the grassroots level.

Tasks and Recommendations

1. Access to data is not streamlined. If a family member needs final orders from the courts or questions the accuracy of a grandmother's distribution from a deceased grandfather's holdings that contain producing wells and a right of way, it has become the burden of the grandchildren to gather all lease numbers, assignment of leases, right of way location and all final probate orders. Grandchildren may or may not have graduated from high school and are unfamiliar with probate documents or they may have Phd's from Harvard but still must gather, review, and analyze data that is difficult to access from multiple locations.

If landowner consent is needed to negotiate a right of way, the allottee or potential heir must know all information about past agreements and current information related to the property. When a landowner asks concrete questions about where to access certain documents, the Federal respondent almost always replies "I don't know but I will get back to you or I'll have someone else get that information for you." Another block of precious time goes by. By not obtaining proper timely information or key documents the process is stalled and puts the landowner in a compromised position.

A stalled process certainly impedes Consolidation Agreements authorized under AIPRA. Consolidation Agreements benefit landowners with interests in a fractionated parcel. Interests included in a Consolidation Agreement are not subject to purchase under 25 USC §2206(p). So if a family has not consolidated ownership in the allotment or drafted specific wills, they are not likely to be able to purchase at probate because of a lack of family funds. A Tribe does have the ability to purchase and, if a Tribe does not purchase the entire allotment, a stranger to title is created which makes it more difficult for landowners to consolidate.

A Consolidation Agreement must be negotiated with correct ownership information and presented in final to the Hearing Officer during the pendency of the probate so the documents must be timely retrieved. ILWG does not have knowledge of an actual Consolidation Program in effect and knows only of a few agreements that have been completed.

Another tool authorized by AIPRA is the Owner Managed Interests (OMI) which amends the Indian Land Consolidation Act. OMI's may enter into leases and manage the lease but must have all the necessary backup documents so the proper collections and accounting among the owners is also correct. OMI's also can be a danger. AIPRA requires 100% agreement to enter the OMI and 100% to terminate the OMI. The problem is that upon the death of one the original owners the successors to decedents interests must track down the all of the other parties to the OMI for probate purposes to effect changes to the document. There may be no bookkeeping records at the federal or tribal level and tracking the records among the parties is nearly impossible. It could go on exponentially as other original signers to the OMI become deceased. ILWG advises a sunset provision be inserted into OMI's as they are first drafted.

A 1988 Audit by Arthur Anderson identified 5 leases tested and each of the 5 files did not contain properly completed lease modifications. Attendees at our conferences more than two decades later bitterly complain of the same experience. If they do not have an opportunity to review backup documents in preparation for a probate, the errors can continue on as Arthur Anderson's audit shows for decades..

Recommendation: Hire or staff an IN-TAKE SPECIALIST at each agency that only prepares documents and meets with allottees. DEVELOP A CHECKLIST. The package should have Title Status Reports (TSR), all leases, maps, allotment numbers, enrollment numbers for

ancestors and final probate orders. Have a STRICT DUE DATE. The in-take specialist must explain each document to the putative heir.

In addition and separately, the Bureau of Indian Affairs (BIA) should have a very active Consolidation Program of assisting individual landowners with consolidation of their fractionated interests in an undivided parcel pursuant to 25 USC §2206(e). Require the Program to have all TSR's, leases, maps, allotment numbers, enrollment numbers for ancestors and final probate orders readily available.

2. Appraisals. During ILWG conferences for the past six years, allottees have complained about AIPRA appraisals. Most allottees have cited the lack of training of appraisers, minimal knowledge of fair market values, and the extremely slow response time for completing an appraisal. The usual length of time to respond to a request is over a year. If a Tribe can purchase at probate, a value needs to be negotiated with the potential heirs. If heirs want to consolidate they need to do so with a fair value that is agreed to. At one time BIA or OST tried to track appraisals to be completed within one year! Some appraisal requests never made it into the system to be tracked leaving such requests to be held for more than a year before even entering the system.

The main problem concerning the implementation of AIPRA is that BIA personnel have no training or background in the technical issues. AIPRA conducts paper training without teaching the impacts of what the recipients learn. The professional experience in realty or probate fundamentals is under graded at GS grade level. An appraiser certified for agricultural property should not be appraising fractionated interests with a low-ball value using a technique that is not appropriate for Indian Country. ILWG believes there has to be a better system.

Recommendation: Hire or contract as many USPAP qualified appraisers as is needed to meet a strict time-line. Do not allow more than two or three weeks (30 days at most) to complete appraisals. Provide training to appraisers.

3. Timely notice of Pending Probates. It has become routine that co-owners in a highly fractionated allotment are not notified until after the probate hearing and a final order has been issued. It goes without saying that Family Trusts, OMI, and Consolidation Agreements are all tools that should increase the use of wills and substantially reduce the quantity and complexity of probating Indian estates. Notice of a pending probate can trigger the formation of such agreements, but without notice, the likelihood of achieving family plans enforceable under AIPRA is less likely.

Recommendation: Require a probate attorney to present to a probate judge or decision maker a certified list signed by ALL co-owners that they have received notice of the hearing or ask for a continuance of the hearing until all co-owners are notified.

4. Will Writing. ILWG has conducted more than six symposia, numerous roundtable discussions, and various workshops. In addition to these events, ILWG relies on professional expertise and experience covering more than thirty years and concludes that the anecdotal evidence in those forums show **99% of trust or restricted allotments are still probated without a will.** Yet the most harmful and unwanted effects of AIPRA will apply to Indian landowners and their descendents through an intestate probate if no will is created. For example, after a divorce, a young second spouse will retain a life estate and all revenue from the trust allotment "without regard to waste". She may outlive the children from the first marriage and in an intestate probate, with no will, the children are excluded from all revenue derived from the land. The father may well have desired the opposite result but without a will, AIPRA excludes the biological children. Without a will, the "oldest heir" rule excludes other siblings and grandchildren.

When it comes to will writing, terms need to be understood such as *joint tenancy with right of survivorship*. Writing a will and not knowing the result of a term prescribed creates family turmoil. If there are five brothers who hold a trust allotment under this term, all children of the deceased siblings are excluded except for the last surviving brother and only his children inherit. Few Indians understand this, 99% do not write wills and the Federal law, AIPRA, may well go against their cultural beliefs and family ties.

Indians need a vault to hold their wills. To deposit the will, a log or register must be used. The BIA need not be held liable if individuals do not follow the procedure to check in a will for safekeeping but Indians need a safe place to store their document.

Recommendation: The Bureau of Indian Affairs should immediately conduct training and outreach to all landowners, NOT TRIBES, either through internal staff or contractual qualified trainers. In general, Tribes do not conduct workshops or give assistance to grassroots, landowners with interests in trust or restricted property derived from an allotment.

BIA needs to provide storage for wills.

5. Terminology. Probate has its own unique language. Terms such as *tenancy in common, joint tenancy with right of survivorship, permanent improvements, purchase at probate, pretermitted children, etc.* need to be defined for grassroots landowners of trust or restricted property if they are to be expected to write a will utilizing provisions under AIPRA. In 2005, the will situation became so confusing, a staff attorney in the Department of the Interior, Office of the Solicitor, Portland, Oregon prepared a document to highlight AIPRA's provisions. There were definitions and commitments made for the Secretary of the Interior to give notice to heirs and track down missing heirs.

Recommendation: Department of the Interior, Office of the Solicitor should develop and publish a handbook with definitions and mail to every landowner of trust or restricted property,

including the Five Civilized Tribes and Osage who may be owners of property on other reservations.

CONCLUSION

There are three issues with which ILWG has serious concerns. The amendment by Public Law 110-453 on permanent improvements on trust or restricted land must be clarified or removed. Geographic Information Systems (GIS) must be installed at all agencies for immediate use. Tribal Probate Code development must be funded so specialists can be hired.

ILWG has a great deal of pride in making the above recommendations. Our Board Members, staff, consultants and volunteers have either been personally involved in the issues or have conducted the proceedings or acquisition relying on the law. We have a fee-to-trust and acquisitions professional on staff, an expert on oil and gas leasing, an IIM expert, a retired probate judge, and the "first ladies" of timber and agriculture. ILWG's experience totals nearly 200 years of technical, personal, and professional experience. ILWG is unique in terms of depth of knowledge and understanding of Indian land issues.

We support the Committee's attention to the technical implementation of AIPRA. We appreciate the opportunity to testify, Mr. Chairman. I will be happy to answer any questions the Committee may have.

AIPRA Tasks

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| <u>1. Access To Data Not Streamlined</u> | <u>2. Appraisals</u> | <u>3. Timely Notice of Pending Probates</u> | <u>4. Will Writing</u> | <u>5. Terminology</u> |
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| a. The probate burden is solely on the Indian to gather pertinent probate data. | a. Appraisals are not timely. | a. Co-owners in a highly fractioned allotment are not notified until after the probate hearing and a final court order has been issued. | a. ILWG forums show that 99% of trust or restricted allotments are still probated without a will. | a. Probate has its own unique language. Terms need to be explicitly defined for Indian allottees. |
| b. Assembling, reviewing, and analyzing documents is beyond the capabilities of the layman as well as the educated professional. | b. There is a shortage of trained professional appraisers. | b. Timely notice of a pending probate can trigger the formation of Family Trusts, OMI, and Consolidation Agreements for the individual Indian and family members. | b. The most harmful and unwanted effects of AIPRA apply to Indian landowners and their descendents through an intestate probate. | |
| c. Consolidation Agreements and Owner Managed Interests (OMI) under the Consolidation Program are practically nonexistent because of a lack of timely information. | c. Appraisers have minimal knowledge of current fair market values. | | c. Terms of art when it comes to will writing need to be understood such as <i>joint tenancy with right of survivorship</i> . | |
| | | | d. Will writing and the Federal law, AIPRA, may well go against Indian cultural beliefs and family ties. | |
| | | | e. Storage vaults for approved Wills need to be funded by the BIA. | |
| Recommendation: Appoint, hire or staff an IN-TAKE SPECIALIST at each agency that only prepares documents and meets with allottees. | Recommendation: Hire or contract as many USPAP qualified appraisers as is needed to meet a strict time-line. Do not allow more than two or three weeks (30 days at most) to complete appraisals. | Recommendation: Require a probate attorney to present a certified list signed by ALL co-owners that they have received notice of the hearing or ask for a continuance of the hearing until all co-owners are notified. | Recommendation: Bureau of Indian Affairs should immediately conduct training and outreach to all landowners, NOT TRIBES, either through internal staff or contracted out to qualified training. | Recommendation: Department of the Interior, Office of the Solicitor should develop and publish a handbook with definitions and mail to every landowner of trust or restricted property, including the Five Civilized Tribes and Osage who may be owners of property on other reservations. |