

TESTIMONY OF DOUGLAS NASH
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SENATE INDIAN AFFAIRS COMMITTEE
BACKLOGS IN THE INDIAN PROBATE SYSTEM

October 4, 2007

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My name is Douglas Nash. I am the Director of the Institute for Indian Estate Planning and Probate which is a project of the Indian Land Tenure Foundation (ILTF), a non-profit foundation headquartered in Little Canada, Minnesota. The Institute is housed at Seattle University School of Law in Seattle, Washington. The Institute was created by the (ILTF) in 2005 in anticipation of the American Indian Probate Reform Act (AIPRA) taking effect in June, 2006.

I would like to address briefly three areas. First the work of the Institute; second, the impact of fractionation and probate backlogs as discovered through our work; third, suggestions for addressing the issues of fractionation and backlog.

I. THE INSTITUTE:

The mission of the Institute is to assist Indian people in making informed decisions about their property by:

1. Establishing legal service projects that provide free and reduced cost estate planning and consolidation services to individual tribal members;
2. Providing training to tribal members, governmental officials and the legal community, and;
3. Serving as a clearinghouse for the latest information on the American Indian Probate Reform Act.

In addition, we have begun offering review of draft tribal probate codes that will be submitted for approval pursuant to the provisions of AIPRA.

1. Projects:

Our projects are funded by the ILTF and other foundations and provide no cost estate planning services to tribal communities. Over the past four years, we have utilized a number of different and successful models designed to provide estate planning service and information on land consolidation, including will drafting, gift deeds, sales and durable powers of attorney. These models utilize different combinations of attorney, para-legal, and law student interns providing services to selected tribes in South Dakota, Washington, Oregon, Idaho, Montana, Minnesota, and Arizona. In FY 2006, we also managed a one year, one half million dollar pilot project funded by the Bureau of Indian Affairs. Among the stated purposes of that BIA project was to determine if estate planning services were needed in Indian Country and, if so, whether fractionation could be effectively addressed by estate planning. The results indicate an unequivocal yes to both questions. Under that project, estate planning services were provided on six reservations in Washington and Oregon as well as reservations in South Dakota. Copies of that final report will be provided to you.

Overall, the projects that we have developed and overseen have resulted in a total of 1,326 wills and 1,142 other estate planning documents being completed at no cost to Indian people. Insofar as I am aware, ours is the only program in the country that is

seeking to provide estate planning services on a large scale in Indian Country. We develop programs as funds become available. However, our current projects do not even come close to meeting the need nation-wide and private funding for these services is very difficult to come by as it is viewed by private foundations as a government problem.

2. Training:

We have held two-day, national symposia in Seattle, WA, Rapid City, SD and Tempe, AZ in addition to responding to requests from tribes, organizations and state bar sections in Montana, Idaho, Nevada, South Dakota, Minnesota, Washington and California. We are currently planning national programs to be held in Minnesota, New Mexico and again in Seattle. For our symposia, we bring in a wide range of experts as presenters including Judges from the Office of Hearings and Appeals, Attorney Decision Makers, Bureau of Indian Affairs officials, personnel from the Office of the Special Trustee, Indian Land Consolidation Program, law school faculty, Tribal and private attorneys. We have heard the questions posed by hundreds of Indian land owners who have attended these sessions. We have the benefit of interacting with all of these individuals whose knowledge and information contributes to our knowledge of the probate process.

More Information on the Institute is available at www.indianwills.org.

II. FRACTIONATION OF LAND AND PROBATE BACKLOG

With that background, I'd like to offer some observations and thoughts about the backlog in Indian probate cases.

Fractionation of trust allotments is a fact and one that has been recognized as an exponential problem in many governmental studies including the 1928 Meriam Report¹. Examples and figures abound. With the focus on fractionation, it should also be noted, however, that not every parcel of trust land is highly fractionated and if highly fractionated, can still have substantial economic value.

In many locations where the allotment process was late in being applied to reservations, or individual owners were tenacious in land protection, large interests including 100% ownerships, are found. In many instances, an interest less than 5% of the total parcel will have minimal economic value. However, 5% of a 160 acre parcel of land is 8 acres which could well be suitable for many uses. Likewise, an interest that is less than 5% of a parcel situated in a municipal setting in southern California or which overlays valuable oil or mineral deposits, has substantial economic value. Additionally, even small

¹ Lewis Meriam et al., *The Problem of Indian Administration: Report of a Survey Made at the Request of Hon. Hubert Work, Sec. of the Int.* (Feb. 21, 1928) (John Hopkins Press, 1928) available at http://www.alaskool.org/native_ed/research_reports/IndianAdmin/Indian_Admin_Problms.html.

interests in an original allotment can have historic, cultural, familial and personal values to an individual owner that are far more important than any economic consideration.

Fractionation is a significant factor in the probate backlog, as each interest, however minute, requires accurate title records from the inception of decedent's probate package, distribution at probate and entry of new title transfers to heirs.

The probate process requires the involvement of three different entities – the Bureau of Indian Affairs, the Office of Special Trustee and the Office of Hearings and Appeals. There are delays that apparently stem from each agency and the need for additional personnel and resources is often raised as a potential to the backlog problem. It appears that all agencies are making significant progress on the existing backlog. OHA is doing so with a small number of judges especially compared to the number of probate, realty, and contract personnel involved at the BIA and tribal end of the process. In light of the existing caseload and the future impacts of AIPRA allowing for purchase options and consolidations during probate which will further slow the process, increases in the number of judges should be considered.

There are other complicating factors that need to be addressed as well.

1. Trust Land Ownership Records

The BIA has the responsibility of preparing a probate file as the first step in the probate process. This involves the gathering of all relevant information about the decedent including records of trust land ownership. Those records are currently maintained at different agencies and in several Land Title Record Offices around the country that maintain records for different regions. The number of fractionated interests complicates the ownership record keeping process by sheer numbers and the fact that one individual may well own interests that are recorded in more than one LTRO. Changes in ownership are not necessarily recorded at a uniform pace and a probate file may be sent forward that does not include all of the interests owned by a decedent at the time of death, making the probate inaccurate and necessitating additional probate proceedings and a modification of a final probate order. When a final probate order is issued, that order is sent to back to the BIA where changes in title ownership – from the decedent to heirs – is to be recorded. Because those orders may have to be interpreted and recorded by several different LTROs, there may be differences in the interpretation process.

There are errors in the land title records. I know from personal experience that there are inconsistencies between records in the TAAMS and TFAS systems. To achieve consistency in policy and interpretation, increased accuracy and timely recordation of changes in ownership, having central land ownership records accessible nationally with well defined procedures would be a positive step.

Outdated ownership records and databases create a new probate backlog as they are corrected, increasing the work for the BIA and OHA. As title records are corrected, new heirs are found requiring case openings, often with one or more heirs deceased

resulting in reopening and modifications to closed probate cases. Many of these old cases predate the Protrac system, which means the data must be entered by BIA before OHA can begin probates.

Finally, under AIPRA, measurements of fractionated interests will be used to determine consent requirements for sales at probate, partitions and also the application of the intestate “single heir” rule. This is significant. Accurate and up-to-date title records are essential to avoid the misapplication and taking of interests without consent. As historically evidenced by Youpee, the return of fractionated lands to rightful heirs is an costly and onerous process that is difficult to achieve.

2. Probate Files

Probate begins only when a death is reported to the BIA and that reporting is dependent upon members of the family or community. That may not happen for a long time after the death actually occurs. For example, the death of a person who is not married and who has no descendants may not be reported as promptly as that of an individual who has a large family. Presumption of death cases require additional work and a higher level of expertise than the typical probate cases as OHA must make determinations that an individual is presumed to be deceased. One recommendation is to allow BIA and OHA to use OST investigators in developing and adjudicating these cases. The failure to have a death reported or death presumption cases may well result in further errors in the probate of related estates resulting in additional case reopening and modifications.

It is our understanding that the BIA has initiated a quota system for the preparation of probate files in an attempt to increase the number of files sent forward to OHA for probate. This has resulted in a significant reduction in the backlog reported. However, in many instances, this has increased the number of files sent forward incomplete requiring the files to be sent back to the BIA or the OHA must attempt to finish compiling the necessary information. It is not known how returned files are reported in the backlog process.

In these kind of situations, OHA judges are often placed in the position of having to do work on probate files to make them complete. They do not have investigators or staff to perform that function. The ILTF and the Institute have discussed the prospect of developing a model intern/extern program to work with OHA judges and which could address that need. While such a program could be developed and, we believe, initial private funding could be obtained, it ultimately would require federal funding to support and continue it.

3. Planning and Coordination

Because the Indian probate system depends upon separate agencies and several different offices within those agencies, there is clearly a need for integrated data sharing and coordination between all involved.

4. Impact of AIPRA on the Probate Process

The full impact of AIPRA on the probate process is yet to be seen. That impact will not be fully seen until most or all of the cases before OHA are those where the decedent passed away after June 20, 2006, and thus are subject to the provisions of AIPRA. However, it is expected that the need to address consolidation agreements and purchase options as part of the probate process will result in some cases taking more time to close.

III. SOLUTIONS

Tools to reduce, and ultimately eliminate fractionation, already exist. Those tools include: 1. The American Indian Probate Reform Act, 2. Estate Planning services for Indian Country and, 3. The Indian Land Consolidation Program. Recommendations for improvements are mentioned throughout this testimony.

1. The American Indian Probate Reform Act.

AIPRA contains a multitude of mechanisms that can be used by the Secretary, tribes and individuals to consolidate interests in trust allotments. Examples include tribal land consolidation plans, consolidation agreements, fractional interest acquisition program, purchase options at probate, renunciation and partitioning that reconsolidates all interest in one owner. Other mechanisms such as the single heir rule and testamentary presumption of joint tenant with right of survivor will serve to avoid further fractionation of small interests in trust lands. Given sufficient time, the Act will have the intended result of reducing fractionation through consolidation of interests.

2. Estate Planning

Estate planning is an important and unrecognized tool for reducing fractionation and probate cases, reconsolidating land interests, and furthering an individual's ability to voluntarily manage their own lands. Additionally, estate planning diminishes the number of land interests entering the probate stream through inter-vivos transfers including sales, consolidation applications and gift deeds². Another important benefit, estate planning allows title records to be corrected or updated when discrepancies are found while the owner is alive as each client has an updated title report reviewed in the estate planning process.

² Under AIPRA, a person may devise in a will a trust interest to anyone defined as an "eligible heir." However, a person cannot make an inter-vivos conveyance in trust to some of those same individuals. The result is that some individuals are forced to wait until death and probate to achieve what they might otherwise wish to do while alive. The purpose and intent of AIPRA would be furthered by simple legislation authorizing the inter-vivos conveyance of interests in trust land, in trust, to all persons defined as "eligible heirs" under AIPRA.

The Institute's projects provide community education to landowners and client counseling, successfully highlighting consolidation options with a will and lifetime transfers. The result – only 8% of wills drafted further fractionate lands; and gift deeds, sales and consolidation agreements transfer the lands during life avoiding the probate process entirely. Because AIPRA's intestacy rules distribute interests 5% or greater to all eligible heirs as tenants in common, further fractionating ownership interests, estate planning provides greater tools for protection against fractionation than AIPRA itself.

AIPRA is highly complex with provisions coordinated with other federal acts and codes. The Act, combined with the withdrawal of BIA will drafting services, has created a huge void of specially trained professionals to provide estate planning for Indian people. The need for trained professionals has been voiced to us from every quarter. It is our estimation that there are currently less than 100 legal professionals currently trained nationally. We have already seen the results of will drafting being done by attorneys who are unaware of AIPRA and its ramifications for their clients. This poses a potentially disastrous result for the Indian client in terms of their estate plans and desires. It also poses a potentially disastrous professional liability for the attorney who performed the work.

While our projects have had a beneficial effect, the tribal communities served are very limited. The pursuit of private funds to support this work has been met with very limited success, as the work is often viewed as a governmental responsibility. AIPRA contains an authorization for appropriations for estate planning work in Indian Country. An appropriation of funds sufficient to deliver these services throughout Indian Country would significantly advance the effort to reduce, and eventually eliminate fractionation. AIPRA's goals will fail unless funding for professional estate planning services is provided.

3. Indian Land Consolidation Program.

The ILCO program, established in April 2003 as a pilot program on a limited number of reservations, has a demonstrated remarkable record of success in eliminating fractional interests, purchasing 359,723 interests for tribes and precluding them from ever reaching probate. The mechanics of the program need not be reviewed here. The program has broad support for three primary reasons – first, trust interests are purchased on a willing seller basis; second, purchase are made at fair market value and; third, the interests purchased are consolidated into tribal ownership. Given the very significant results achieved by this program it is amazing that funding for it has been significantly reduced for FY 2008, to a level that will not allow it to reduce the number of fractionated interests but only maintain the status quo against the ever increasing numbers of fractionated interests coming into existence. This is especially amazing since the purchase price is ultimately repaid by revenue generated from the acquired interest. The program currently operates on only eight reservations, all located in the Midwest. The Indian Land Consolidation Program has proven itself to be a highly effective tool in the elimination of fractionated interests with the benefit of affecting consolidation of those

interests in tribal ownership. The program should be expanded to other reservations and should be funded at a substantially increased rate.

A news article some time ago noted that there was no quick fix for Indian probate problems and that remains true with regard to the backlog of cases. Fractionation and the attendant problems that flow from it began with the allotment process 130 years ago. AIPRA, estate planning services and the Indian Land Consolidation Program will ultimately resolve the fractionation problem or reduce it to an insignificant level. The elimination of fractionation will go far in reducing the complications in the probate process that feeds the backlog seen now.

4. Revised Process Recommendation

Arvel Hale, former Chief Appraiser for the BIA who now works as a consultant on appraisal and systems issues, has a suggestion for reducing the time required to prepare probate documents. He proposes developing a system that will:

- (1) Retrieve the ownership data from the Land Records System (TAAMS)
- (2) Retrieve money amounts from the IIM accounts
- (3) Retrieve names and addresses of the heirs from the enrollment system
- (4) Prepare property value estimates using a Mass Appraisal Model that utilized inventory data from the trust land management system
- (5) Calculate the entitlements from the probate to be conveyed to the heirs.
- (6) Electronically compile and print data in report formats that would be helpful to the Probate Judges.
- (7) As Probate Judges rule on the cases the land records could be automatically updated from the information in the probate system.

He has advised that this system would require links to existing BIA and OST databases so that data can be efficiently passed between them and the probate system. The technicalities involved in developing this kind of system are far beyond my understanding, but I would be happy to assist in exploring the prospect further with Mr. Hale should that be of interest to the Committee.

5. Alaska – A Unique Opportunity

Alaska presents a unique opportunity in terms of Indian estate planning. Whether one agrees with the allotment process, there are first generations allotments in Alaska. This presents an opportunity to avoid the fractionation crisis and to demonstrate that fractionation can be avoided by estate planning.

IV. CONCLUSION

I would like to thank this Committee for allowing me the opportunity to appear and offer testimony on this important issue. I would like to especially thank this Committee for its interest in the Indian Probate Process and in making it work for the benefit of Indian people, tribes and communities.

If we can provide any further information or respond to any questions, we would be happy to do so.