Testimony on The Indian Trust Reform Act of 2005, S.1439
before the
U.S. Senate Committee on Indian Affairs

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Honorable Chairman and Members of the Committee, I appreciate the opportunity to address this Committee on these very important and complex matters related to trust reform. I also want to express our support and appreciation for your sponsorship of this important legislation.

The ILWG was founded in 1991 to address issues related to restoration, use and management of tribal and individual trust lands We are very interested in this legislative initiative as our organization seeks to reform the standards and practices which impact our tribal and individually owned trust lands.

Trust reform means eliminating the double standard by which our lands are used and managed. This standard allows prime agricultural lands on the Ft. Hall Reservation to be leased out for $80. an acre, while just off the reservation, comparable land is leased for $350 - $400. an acre. As Chair of the ILWG, I could give you countless examples occurring across Indian Country, but we are here today to offer support for, and offer recommendations to strengthen Titles II through VI of the Indian Trust Fund Reform Act of 2005.

The ILWG would like to recommend ways this legislation can assure that the situation just described, is remedied. We would suggest, that if the standards by which private trust assets and trust accounts are managed, is applied in the management of the Federal Indian Trust, we will see great improvement. In other words, we want to assure that the records which reflect the ownership of our clients – tribes and individuals - are managed by the standard used by the Chicago Land and Title Company, for its' clients. We want to assure our lands are appraised or valued according to the federally accepted Uniform Standards of Professional Appraisal Practices (USPAP) when leased. Our land and resources are no less valuable.

NEGOTIATED RULEMAKING CRITICAL FOR IMPLEMENTATION OF ALL TITLES II –VI

First and foremost, we recommend that S.1439 include the negotiated rulemaking process as provided for in the Negotiated Rulemaking Act of 1990. In passing the Negotiated Rulemaking Act, Congress noted that the ordinary rulemaking procedures used by agencies tend to discourage the affected parties from meeting and communicating with each other.

Negotiated Rulemaking has been successfully built into the development of rules for the following statutes: The Indian Self-Determination Act; the Tribal Self-Governance Act; development of the Transportation and Highway allocation formulas for Tribes; and currently for Indian education allocations under the "No Child Left Behind" initiative.

Inclusion of negotiated rulemaking, or "reg-neg"within the Trust Fund Management Reform Act of 2005, will assure that the parties impacted by this trust reform initiative – the U.S. Government, Tribes, and Indian individuals - are at the table. Rules for implementation can be developed within a level playing field; experts can be called upon; studies can be initiated - all towards the goal of developing fair, equitable and sound rules.

We are submitting Exhibit A for the record, which is a resolution, passed by the National Congress of American Indians in 2000, which supports "Establishment of a Negotiated Rulemaking Committee to Develop Trust Reform Regulations with the Full Participation of Indian Tribes and Individuals they are intended to Benefit".

TRUST LAND RECORDS MUST BE CURRENT, SAFEGUARDED, AND ACCESSIBLE FOR IMPLEMENTATION OF ALL TITLES IN S.1349

ILWG believes that record keeping is at the foundational core of trust reform. Trust income is derived from trust land and resources. A trust land inventory needs to be in place whereby all calculations and transactions related to assets, can be made based on a current, or certified Title Status Report. Several severe backlogs related to records, are having a detrimental impact on management of trust assets.

Probate Backlog: It is estimated that the current probate backlog is well beyond 22,000 cases impacting thousands of Indian heirs. Exhibit B is correspondence from Aurene Martin to the Regional Directors stating "…The estimated backlog is now well over 22,000 cases and the BIA must take immediate action to develop and implement a plan to eliminate the backlog… Elimination of this backlog is a key component to our trust reform initiatives and compliance with Cobell mandates." The 22,000 backlogged cases are those that have not reached the Office of Hearings & Appeals for hearing

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To address the backlog, the 1999 Probate Re-invention team recommended that Attorney Decision-Makers (ADM's) be hired. Ten ADM's were hired and housed within the Bureau of Indian Affairs. The High Level Implementation Plan provided that the authority of the ADM's would be expanded so they could take testimony under oath during probate hearings.

Then in 2003, ADM's were transferred to the Office of Hearings and Appeals (OHA) to "consolidate" probate functions. All were hired through Indian Preference. Originally 10 were hired, now only three remain. Seven positions are vacant.

Shirley Mosho, a tribal member from the Ft. Hall Indian Reservation is one of the thousands caught up in the backlog. Her mother, Anita Mosho passed away 5 years ago. When Shirly inquired about the estate she received correspondence from the Fiduciary Trust Officer stating that the probate "judge waits until there are 30 – 40 probates ready for adjudication before he will schedule a hearing and come to Fort Hall". See Exhibit C.

2% Youpee Interests: In 1997 the Supreme Court declared the escheat provision of the Indian Land Consolidation Act unconstitutional. In October 1998, then Assistant Secretary of Indian Affairs, Kevin Gover, issued a memorandum "Reopening of all Probates in which Property Escheated to an Indian Tribe under 25 U.S.C. Sec. 2206".

To date there are varying estimates ranging from 13,000 to 18,000 as to the number of 2% or less interests that have yet to be returned to the rightful heirs. Tribes and landowners are both experiencing havoc as lease negotiations are disrupted, land consolidations halted, and gift deeds curtailed waiting correction of the title records. Each interest not returned is time and money for Tribes, landowners, lessees, and the U.S. Government.

Certified Land Title: In March 2006 the Acquisition and Disposal Handbook developed as part of the Fiduciary Trust Model (FTM) – Office of the Special Trustee (OST) was released at the National BIA Realty Conference. Due to the backlogs described above, the handbook advises that land transactions may be implemented without certified title status reports. This means that because of the current probate and recordation backlog, the Government is implementing a lesser standard on trust lands. This is not trust reform.

Unfilled Positions: We were recently informed that the Title Plant in Albuquerque, NM has 10 vacancies because of budget constraints, and is due to close in September 06. This title plant is responsible for land records in the BIA Southwest, Western and Navajo Regions. This is not trust reform.

Recommendation*:* Staff all Title plants at levels necessary to address the recordation and certification backlog. Staffing would include title examiners, surveyors, recordation and related staff needed for title certification. Fill vacant ADM positions. We request the Committee to work with OST and the Budget Committee to fill these positions.

Recommendation: That no transfer of Indian trust records be made from any federal facility without being imaged. Several Tribes have reported to us that lease records are being transferred to the American Indian Records Repository without first being imaged. Imaging will prevent further loss of records.

Recommendation: The Department of the Treasury records of the financial transactions that occur while the trust funds are managed by the Federal government should be protected. Treasury records are scheduled to be destroyed after the records are 6.5 years old. We recommend that no Treasury records be destroyed relating to tribal and individual trust land income.

Recommendation: The American Indian Records Repository (AIRR) is not easily accessible to Tribes and individual Indians. Records should be locally accessible as imaged copies or received in electronic format by BIA Agency or Tribal Offices.

Title II – Indian Trust Asset Management Policy Review Commission

Title II establishes a Commission for the purpose of 1) reviewing trust asset management laws (including regulations) in existence on the date of the enactment of this Act governing the management and administration of individual Indian and Indian tribal trust assets; 2) reviewing the management and administration practices of the Department of the Interior with respect to individual Indian and Indian tribal trust assets; 2) making recommendations to the Secretary of the Interior and Congress for improving those laws and practices.

This Commission is tasked to do several things that Congress provided for in the American Indian Trust Reform Management Act of 1994 by establishing the Office of the Special Trustee. It gives the illusion of oversight without any degree of responsibility and accountability.

Membership selection would be very political and we are suspect of any positive effort. We recommend that qualifications for such a group, such as consideration for people with trust asset management experience in the private sector trust departments; title or valuation experience; persons familiar with master trust system components that are involved with asset management; and familiarity with Minerals Management, BLM, or BIA operations be selected for this Commission.

Another alternative would be for a Negotiated Rulemaking Committee (usually numbering 20 – 25 persons), to be charged with the selection of the members of the Commission. Under the Negotiated Rulemaking Committee Act of 1990, the Committee, can also call for the formation of advisory groups or special studies to assist in formulation of rules.

Title III – Indian Trust Asset Management Demonstration Project Act

The requirement for Secretarial approval of Trust Asset Management Plans would give the Secretary a very broad discretionary authority to refuse. This contrasts with federal legislation such as the Indian Self-Determination Act (ISDEAA), which gives narrower authority to the Secretary to disapprove a tribal contract or compact, or the American Indian Probate Reform Act which gives narrower authority to disapprove a tribal probate code.

It is important to build standards such as described in Section 304: Standards (2)(E) which require that “any activity carried out under the plan be carried out in good faith and with loyalty to the beneficial owner of the trust”. In certain situations the tribe may find itself in actual competition with its own members with regard to use and development of resources. Individual tribal members want to be assured that management plan requirements do not put them at a disadvantage if there is competition for the same resource, be it timber, oil and gas, water, etc.

In addition, there needs to be some type of recourse such as described in "Section 304: Contents(2)(E) establish procedures for nonbonding mediation or resolution of any dispute between an Indian tribe and the United States relating to the trust asset management plan". The ILWG recommends that individual landowners be able to access this procedure as a possible means of resolving disputes related to a trust asset management plan.

This section can be beneficial to the Tribes if there is adequate funding to assure proper and effective implementation of the management plans. Resource Management Plans provided for in the National Indian Forest Resources Management Act – NIFRMA, and the American Indian Agricultural Resource Management Act – AIRMA, just as with the Indian Trust Asset Management Project need to be tied to realistic budgets in order to be successful.

The Congressional Authorizing and Budget Committees would need to become strong advocates if adequate appropriations were to be obtained; OMB needs to be convinced.

Title IV – Fractional Interest Purchase and Consolidation Program

The ILWG views Title IV as a program that can be expanded to provide additional consolidation opportunities for Tribes and individual landowners. We explore these opportunities later in our testimony, but first we would like to comment on the "automatic purchase" provision for lands with more than 200 owners. This provision should be stricken. Having worked with individual beneficiaries for years, we know how they react to something they don't approve of – they do not respond. The purchase of fractionated interests in an allotment dooms that parcel of property and the individuals that own the rest of the allotment, into continual fractionation because it discourages consolidations within families.

The legislation should reconsider the federal liens on repurchased land. In most cases the costs and headaches of administration of these liens generally outweighs their values.

The ILWG proposes that Title VI be implemented according to Uniform Standard Professional Appraisal Practices (USPAP) standards. Just recently we were informed that the Office of Special Trustee – Appraisal Services, would no longer be doing individual lease appraisals. Correspondence to members of the Ft. Hall Reservation reads, "…OST has provided our office with a general overall appraisal that covers the Fort Hall Indian Reservation, and from this appraisal, our office is to set a recommended lease value for each lease…" See Exhibit D. This means that Market Studies will now be used to provide valuation for trust resources instead of appraisals.

Market Studies are now being used to assess land interests purchased under the Fractional Interest Acquisition Program , 25 U.S.C. 2212. The use of Market Studies, which provide evidence of the range of values for general land types located in various areas, is not a substitute for an appraisal of an undivided fractional interest in a specific tract. Under the Indian Land Consolidation Office (ILCO), the office that administers the purchase program,

Market Studies are provided to the BIA Agency realty staff who are required to select a price within the market study range for a specific undivided fractional interest. This selection is not reviewed nor approved by the authorizing authority. It does not comply with USPAP. It is in violation of most state laws because the realty staff is exercising the rights of a licensed appraiser.

We have been informed that you if you are participating in the ILCA Project, within a agency that is servicing a tribe with a large fractionated land base, that you can expect ownership transactions to increase by as many as 5,000 per year.
This means that the traditional methods for preparing appraisals, title reports, deeds, and recordings will be overwhelmed by the ILCA project.

The reaction of some Regional Directors to the ILCA avalanche is to:

1) Adopt appraisal methods that are not compliant with the Uniform Standards of Professional Appraisal Practice (USPAP), violate state laws, and ignore BIA Appraisal regulations.
2) Misrepresent their capacity to provide title and recording services;
3) Deny the realities of preparing notices, letters, and conveyance documents.

Appraisals are an essential part of the ILCA acquisition process because of the Government's fiduciary responsibility to owners of land interests held in trust by the United States Government.

1) The prices for the interests that the Government is offering to buy must be supported by Government approved appraisal reports that comply with federal and state appraisal standards;
2) The universally accepted standard is the Uniform Standards of Professional Appraisal Practice (USPAP);
3) The cost of a single appraisal for each interest acquired by ILCA would be between $300 to $800 for agricultural land and $1,500 to $10,000 for commercial land. Most fractionated interests have values of less than $100. A single appraisal for each land interest is not a practical solution;

The only practical, legal and cost-effective way to prepare appraisals for the ILCA program is to use a Mass Appraisal, which is in compliance with Standard 6 of the USPAP. Most important, by performing the Mass Appraisal to USPAP standards, the fiduciary obligations of the Trustee would be met.

Below, you will find two charts, which show the differences in cost and time between the BIA and the MAD appraisal systems.

Cost to Process Real Estate Transactions of Owner Interests using Current BIA Methods

		Cost per Owner Interest Transaction								
Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Apply	Appr-aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost/ Interest	Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value
Less than $1	3,070	$5	$350	$20	$20	$5	$400	$1,228,000	$1,427	86036.57 %
$1 to $10	12,328	$5	$350	$20	$20	$5	$400	$4,931,200	$58,663	8405.93%
$10 to $50	17,678	$5	$350	$20	$20	$5	$400	$7,071,200	$458,218	1543.20%
$50 to $100	9,245	$5	$350	$20	$20	$5	$400	$3,698,000	$676,842	546.36%
$100 to $1,000	30,868	$5	$350	$20	$20	$5	$400	$12,347,20	$11,523,724	107.15%
Greater $1,000	18,441	$5	$350	$20	$20	$5	$400	$7,376,400	$122,851,554	6.00%
Totals	91,630							$36,652,000		

The cost to complete an application, prepare a deed, update owner records on the computer is based on the time required for a GS-7 Realty Specialist to accomplish those tasks.

The appraisal cost is the contract rate used for non-BIA appraisers to prepare an appraisal report. BIA appraisal staff costs are about the same as contract appraisal costs.

These costs are not the only problem. The time required to accomplish the tasks under current BIA methods will not keep up with the creation of new fractionated interests. In some BIA Regions requests for appraisal reports are over two years old. BIA Title plants are up to one year behind on recordings.

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Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Apply	Appr-aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost/ Interest	Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value
Less than $1	3,070	$5	$1	$1	$20	$5	$32	$98,240	$1,427	6882.93%
$1 to $10	12,328	$5	$1	$1	$20	$5	$32	$394,496	$58,663	672.47%
$10 to $50	17,678	$5	$1	$1	$20	$5	$32	$565,696	$458,218	123.46%
$50 to $100	9,245	$5	$1	$1	$20	$5	$32	$295,840	$676,842	43.71%
$100 to $1,000	30,868	$5	$1	$1	$20	$5	$32	$987,776	$11,523,724	8.57%
Greater $1,000	18,441	$5	$1	$1	$20	$5	$32	$590,112	$122,851,554	0.48%
Totals	91,630							$2,932,160		

Using the appraisal module on the MAD system appraisal costs are reduced from $350 per report to $1.00 per report. The time required for an appraisal is reduced from months and years to about 5 minutes.The MAD system will print the deed. It looks up owner name, owner interests, and property legal descriptions in seconds and prints the Deed.

The MAD system has an owner update module that allows a realty staff to update records, recalculate fractions, check fractions for unity, and print status reports.

The Great Plains Region is the only region in the nation that has a functioning mass appraisal model It is part of the Great Plains Management, Accounting and Distribution (MAD) system.

Currently, the MAD program is being used in the Great Plains Region. However, the Great Plains Region is not complying with the USPAP to run the ILCA program. Project staff runs the MAD mass appraisal program without verifying the accuracy of the data or having the reports approved by the appropriate delegated official. Appraisals are being made by staff that are not licensed; staff is representing the results to owners of undivided fractional interests in trust land as a fair market value.

In managing the Indian Land Consolidation Act pilot project authorized by Congress, BIA allows purchases of individual Indian interests to be made without certified titles. The lack of standards in the purchase process results in confusion as to that are the real owners and holds up leases that would produce income**.**

Recommendation: Implement the MAD or like program according to USPAP standards to implement the ILCA program on reservations.

Support Needed For Tribal Land Consolidation Efforts: Just recently the Confederated Salish & Kootenai Tribes (CSKT) were informed by Director of the BIA, Pat Ragsdale, that the Tribes ILCP project was terminated. Correspondence to the Tribes reads, "This is to reply to you letter of February 9, 2006, in which you requested reconsideration of the Bureau of Indian Affair's January 24, 2006 notice of the decision to terminate the Indian Land Consolidation Program (ILCP) and the related Cooperative Agreement with the Salish-Kootenai Tribes on the Flathead Reservation…" The letter goes on "…The Termination of both the federal ILCP and the Cooperative Agreement will be effective February 28, 2006." See Exhibit D. The Tribes were targeting purchases of fractionated interest within allotments where they are large interest owners. It appears they didn't fit into the ILCO priorities of purchasing 2% or less interest shares and were thus terminated. The ILCO Project needs to support Tribal land consolidation efforts.

Support Needed for Individual Owner Consolidations: on the Flathead Reservation tribal member Kay Johnson owns 75% of allotment # 1941. The Confederated Salish & Kootenai Tribes (CSKT) who up until just recently were part of the ILCP Program, asked if they could use a portion of their ILCP project dollars for a loan to Ms. Johnson, who is trying to consolidate – become sole owner – in the allotment. I might mention that the other 25% is co-owned by approximately 71 other owners, including the Tribe. The Indian Land Consolidation Office (ILCA) said no.

Recommendation: ILCA purchases should be tied to a tribal or individual consolidation plan. Currently, the ILCA project is prioritizing purchase of 2% or less interests of low value. The project ignores consolidation efforts by both tribes and individuals. ILWG also recommends that co-owners should be notified regarding opportunities to purchase from willing sellers in their allotment. If there are no will buyers, then the Secretarial purchases can be made.

Recommendation: Tribes and BIA ILCA Projects need to be able to use ILCA dollars for low-interest loans to individuals. Financing is not readily available to Indian landowners wanting to purchase fractionated interests. Banks are hesitant to lend to individuals who are owners of undivided interests on trust property. The benefit to this would be an increase in landower consolidations and a reduction in number of owners/records.

Title V- Restructuring Bureau of Indian Affairs and Office of the Special Trustee

Title V of S. 1439 creates an Under Secretary for Indian Affairs position that is directly subordinate to the Secretary of the Interior. The Under Secretary for Indian Affairs would replace the Assistant Secretary and the functions of the Special Trustee would be transferred to the Under Secretary. The Office of the Special Trustee would be terminated in 2008.

The ILWG supports the creation of the Under Secretary for Indian Affairs within the Department of the Interior and strongly supports the termination of the Office of the Special Trustee. We consider this restructuring as a step towards improving the administration of services and programs impacting Tribes and Indian individuals.

However, we will continue to advocate to change this position from Under Secretary for Indian Affairs to Deputy Secretary for Indian Affairs, and to give the Deputy Secretary authority to supervise any activities relating to Indian Affairs carried out by the Commissioner of Reclamation, Director of BLM, Director of MMS, the Fish & Wildlife Service and the National Park Service. Our sense is that this would go a great deal further in terms of resolving the administrative conflicts of interest that currently exist within the Department.

As proposed, this restructuring creates a single line of authority for all functions that are now split between the BIA and OST. The Office of the Under Secretary would have the responsibility of supervising any activities related to Indian Affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service

ILWG recommends that the Under Secretary also have the responsibility of supervising any activities related to Indian Affairs that are carried out by the Fish & Wildlife and the National Park Service.

The ILWG strongly supports Section 505 of the legislation, which would terminate the Office of the Special Trustee by the end of 2008. It was certainly never the intent of Congress within the Trust Fund Management Reform Act of 1994 to set up a permanent office for this position. The budget to support the trust reform efforts of this Office has drained millions of dollars in resources from the local level. The Office of the Special Trustee has continued with a reorganization plan that was opposed by both Tribes and individual Indians. Section 505 is a welcome change and we urge the Committee to pass this important provision.

We support the suggestions made by the National Congress of American Indians to this Committee related to the proposed authorities and responsibilities of the Under Secretary. These authorities and responsibilities can be formulated and implemented within a Negotiated Rulemaking Committee process.

Title VI – Audit of Indian Trust Funds

The ILWG strongly supports Title VI which requires the Secretary of the Interior to prepare financial statements for individual Indians, tribal and other Indian trust accounts, as well as prepare an internal control audit. This Title directs the Comptroller General of the United States to hire an independent auditor to audit the Secretary's financial statements and report on the Secretary's internal controls.

The current DOI Reorganization Plan does not address the auditing of trust funds being held for Tribes, individual Indians, and Alaska Natives within the Department of the Interior. In addition, there is no provision for auditing the programs and processes i.e. leasing, acquisition and disposal, compliance, improvements, irrigation, title correction, etc., which impact, trust resources - land, water, and minerals. For example, the oil and gas production impacting assets owned by Tribes and individuals, are not audited to the producer level - in either a compliance audit or a financial audit - by any independent auditor.

Tribal and individual leases administered by MMS governing hard minerals production and non-standard leases standard leases that do not fit the MMS compliance model, are not audited. As a result, thousands of individual Indians have their trust assets reviewed in only a cursory manner by external auditors who are unfamiliar with the legal history of these trust assets held and managed by the Secretary.

Trust resource audits need to be performed in a timely and professional manner paralleling the standards applied to private sector financial trust departments. Trust audit standards, comparable to those applied to private sector financial trust departments, need to be applied to tribal and individual trust assets.

This would mean that the Office of the Comptroller of the Currency, as well and the internal and external independent auditors would audit programs in a manner which met strict trust audit standards. This would mean that auditing the trust funds and other types of trust assets at various times during the year. Today, that coverage is practically non-existent for the trust funds.

This Title is a good beginning towards implementing federal trust audit standards and internal controls as described above.

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