

**TESTIMONY OF CRIS E. STAINBROOK, PRESIDENT OF THE
INDIAN LAND TENURE FOUNDATION (ILTF)**

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS

May 7, 2003

Regarding S. 550, the American Indian Probate Reform Act of 2003

Chairman Campbell, Vice Chairman Inouye, and distinguished members of the Senate Committee on Indian Affairs:

My name is Cris Stainbrook and I serve as the President of the Indian Land Tenure Foundation (ILTF). On behalf of the ILTF Board of Directors and the community that ILTF serves, I thank you for this opportunity to present some perspectives and thoughts on S. 550 and also provide you with some information about our organization and work.

The Indian Land Consolidation Act of 1982, the ILCA Amendments of 2000, and the bill before us today are of great importance and substantial concern to the Indian land owning community that we serve. Each piece of this legislation deals with the very essence of Indian Country—land. It is Indian peoples' concern for retaining the remaining Indian owned and controlled reservation and off-reservation lands, as well as reacquiring the tracts of land once guaranteed by treaties, executive order or other means for the exclusive occupation and use by Indian people but now in alienated ownership that led to the creation of ILTF. These concerns shape our mission and purpose. In testimony last week before the Committee for S. 519, I provided a brief background about the Indian Land Tenure Foundation and our acceptance of a \$20 million start-up grant from Northwest Area Foundation. Rather than repeat the information here, I will attach the S.519 testimony for your review (Attachment A).

In the testimony a week ago, I pointed to undivided ownership interest or fractionated ownership as the most insidious outcome of the General Allotment Act. This pattern of ownership has effectively rendered millions of acres of Indian land unused, unmanageable, and in constant jeopardy of being taken out of Indian ownership. This, of course, says nothing of the large administrative costs borne by the federal government and the tribes in maintaining ownership records and distributing income from the allotments to the correct owners. And so today's hearing is rather timely given that probate and inheritance provide the basic mechanism for creating and furthering the amount of land ownership fractionation.

As I testified last week, the Indian Land Tenure Foundation strongly holds to the principals of self-determination by the tribes and Indian people. Those principals were at the basis of the Foundation's founding and will guide our work into the future. It is also those principals that compel us to provide testimony on S. 550. For, like the Act this bill seeks to amend and the preceding amendments of 2000, it is our conclusion that the amendments proposed in S. 550 will do little to return self-determination to either the tribes or individual Indians. Indeed, some of the provisions in S. 550 continue to winnow away at self-determination as well as the individual rights of Indian people that others in this country enjoy. We also believe that provisions contained in S. 550 will not accomplish the goals of this measure as alluded to by the findings outlined in Section 2. Probate or estate planning will become more difficult for Indian trust land owners, record keeping and administrative costs will likely increase or at best remain the same, and most importantly, Indian land ownership of these lands will be jeopardized.

Before addressing the specific issues of S. 550, I would beg your indulgence to consider a different possibility. That possibility being, there are resources, capacities and energies throughout Indian Country that could be mobilized to address the issue of fractionated ownership on allotted and restricted lands but have not been brought to bear on the issue.

Since the passage of the General Allotment Act in 1887, the federal government has maintained a trust relationship with the tribes and Indian people based on the premise that Indian people were incompetent to handle their own affairs. In fact, that basic relationship is hammered home even today as people seeking to have their land holdings converted from fee status to trust status often find the most expedient method to gaining approval is to declare themselves incompetent. While in reality, their reasons may be for jurisdictional or financial purposes. Nonetheless, the paternalistic relationship between the federal government is continued and has continued for the past 115 years.

The relationship between the federal government and the tribes took a dramatic shift during the Nixon Administration with the declaration of tribal self-determination as a federal policy. Today we can see the advances many tribes have made in the intervening years including the implementation of self-governance compacts that many tribes now work under. These agreements did not reduce the overarching trust responsibility of the federal government to protect tribal rights but did allow the tribes to determine for themselves the directions they would move on many fronts such as economics, resource management, and governance. The tribes have taken advantage of the ever increasing skills and capacities of Indian people to inform and direct their advances. These skills and capacities were honed not just in the culture and teachings of the various tribes but also in the surrounding non-Indian culture and educational institutions. Today, there are many, many Indian people that are the drivers behind tribal programs and enterprises that compete well with non-Indian institutions and businesses.

A similar transformation in the relationship between individual Indians and the federal government has never occurred. Why this is this case is purely a matter of conjecture but I would posit to you that there has simply never been a consolidated movement for Indian people to be recognized in the main as competent to handle their affairs. The probate and land issues before this Committee are a manifestation of this relationship over the many years and what has amounted to attempts by one side, the federal government, to resolve issues of primary importance to the other side, Indian people, without engaging as equals. It is my personal opinion and the position of ILTF, that Indian people, given the chance to resolve probate and fractionated ownership interests, have the skills, abilities, and wherewithal to accomplish the feat faster than the federal government through legislative dictates.

Earlier this year, we had the opportunity to discuss land issues with members of the Committee's staff. With only a modicum of frustration showing, they suggested that perhaps it was time to engage in a complete overhaul of the federal government-Indian land relationship. We would agree, it is time. As demonstrated during the planning process which created the Indian Land Tenure Foundation, Indian people throughout the community are interested in resolving the same issues that we are discussing here today. Further, because it is their assets and they are living in the situation day-to-day, they are willing and capable of engaging the discussions necessary for a new relationship. The Committee should consider working with Indian people anew to resolve fractionated ownership and probate issues.

During my testimony last week, I briefly described ILTF's work on developing the Indian Land Capital Fund (ILCF). This Fund is envisioned to be a private capital investment mechanism aimed at consolidating undivided interests and recovery of alienated land within reservation boundaries.

In many ways the development of this investment fund could be the start of the new land relationship. For instance, the Indian Land Capital Fund is designed to be an equity investment pool and as such will provide Indian Country with a relatively new model of financial investment in Indian land. To date, most financial investment related to Indian land has been through debt financing. The benefit of the equity investment is that it would help to leverage debt and would allow the Fund to develop more rapidly and larger. However, understanding and applying debt equity to Indian land will take new understandings on the part of investors as well as tribes and Indian people.

In addition, ILTF has begun to engage several other Indian organizations in the creation of ILCF and clearly defining the activities that will be carried out in support of the fund. Through our developing relationship with the Native American Bank Community Development Corporation, the investment mechanism will also include opportunities for private and public capital resources to be brought to bear in the development activities on Indian land. Affordable housing development will be of primary concern initially. We will also be working with national and regional Indian organizations such as the Indian Land Working Group to provide training at local sites for individual landowners. A

computer data specialist that is intimately familiar with the Indian land records system will bring title record tracking components to the Fund as well.

ILCF will be a national investment program but with full recognition that the actual deals are made at the local tribal level (Attachment B). The design of the local elements of the Capital Fund will incorporate aspects of the BIA's Consolidation Pilot Projects and the Rosebud Sioux Tribe's Tribal Land Enterprise system of land ownership, management and use. The former program having a longstanding success record in consolidating fractionated interests while maintaining the ability of individual Indians to use land for their pursuits. Utilization of the Fund will be aided by the application of the cooperating partner organization's non-profit activities including but not limited to estate planning, financial counseling, and technical assistance. Other significant aspects of the Indian Land Capital Fund include:

- Initially capitalized through a combination of philanthropic, tribal, government and private sources.
- Allows the tribes to own title to their land.
- Will work with all holders of undivided interests not just those with less than 2 percent interests to prevent further fractionation from occurring.
- Provides for a network of local sites that receive common technical assistance and training.
- Makes provisions for recognizing the individual ownership rights of Indian people and provides technical assistance and guidance in consolidating undivided interests while preventing future fractionation of ownership.
- Allows Indian people and tribes to build ownership interests in the investment pool.
- Adds value to the land through development.
- Becomes a long-term, self-sustaining, for-profit concern.

The financial vehicle we are proposing and constructing will not be without cost to the federal government. Indeed the undivided interests of Indian Country are of the federal government's making and it will need to provide resources to resolve that problem. However, the Capital Fund that is being created will be able to leverage between 5 and 10 dollars of philanthropic, tribal, or private capital to every federal dollar. Federal contributions to the Capital Fund could come in several forms including the provision of seed capital, tax credits for investors, or a program similar to the Energy Savings Performance Contracts already in use by the federal government. In the case of the latter, it would be the savings that accrue to the BIA administrative costs that could be shared with the Indian Lands Capital Fund. When successfully implemented, the mechanism would provide a scale of activity in reducing fractionated ownership throughout Indian Country that the BIA is unable to achieve with the current budget allocations for the Consolidation Pilot Projects.

Also in the earlier testimony, I cited a consultant's estimate that it would require approximately \$1.25 billion to buy every fractionated ownership interest that existed in Indian Country. We believe that while that figure is large, particularly in light of the amounts budgeted for the Land Consolidation Pilot Projects, it is not insurmountable. This is particularly true if federal funds are leveraged with private funds and Indian people are engaged in the process rather than treated as problems or adversaries.

We have had some very preliminary conversations with the BIA and several tribes regarding the Indian Land Capital Fund. It is our intention to continue those discussions with the intent of obtaining at least some portion of the funds dedicated to the Pilot Projects for next fiscal year for the partial capitalization of the Capital Fund. If successful in obtaining these funds, the Indian Land Capital Fund will become operational during the Fall of 2003 at a minimum of four tribal sites.

Ultimately, we believe this model investment program will return decision making and control over their land asset to the tribes and Indian people. Currently the control and management of the asset is subjected to changes in federal policy, law and regulations. These changes seemingly are driven more by exasperation and expedience to resolve the overwhelming size and growth of the fractionation problem rather than resolving the problem with the welfare and concerns of Indian people in mind.

If Indian people and resources are to be engaged in helping correct the problems related to probate and fractionated interests, the opportunity must be made available. To that end, we recommend that the Land Consolidation Pilot Project language be amended to allow the Secretary to

procure the services of appropriate and qualified contractors to provide tribes with the technical assistance and financing necessary to establish tribal land consolidation and acquisition programs.

Having now provided the Committee with a possible alternative to S. 550 allow me to comment briefly on the provisions in the bill which are of most concern to the ILTF community.

Land Title Records

The land title records for Indian land must be updated and verified as accurate before the provisions of S. 550 or the ILCA Amendments of 2000 are implemented. It would be unjust to subject Indian owners to the types of remedies suggested in this bill without being able to first inform them of what interests they hold and allowing them opportunity to take alternative action.

Symptomatic of the problem of inaccurate records are the more than 10,000 undivided interests that have not been returned to the rightful heirs under the Supreme Courts ruling in *Babbitt v. Youpee*. Also indicative of the problem is the probate backlog which a year ago was estimated to be nearing 9,000 cases and has not been appreciably reduced since. Some of these estates yet to be probated date back to the 1940's.

While recognizing that this is not an appropriations bill, we would recommend to the committee that the BIA's regional and agency staff budgets be examined and sufficiently increased to bring the records up to date. This will especially important if other provisions in S. 550 remain in place as those provisions will necessitate additional administration of trust allotments.

Joint Tenancy Provision

This is an untested provision and while it is innovative and intriguing in its uniqueness, it most likely will be tested in court with its first application. This provision will likely result in a Youpee-type resolution and will cost the federal government considerably more in time and funds to correct than any potential benefit it may offer on the front-end.

This provision will also create considerable discontentment within Indian Country and along with the provisions defining who is Indian and the passive trust, many land owners have and will continue to remove their land from trust status. This action of course jeopardizes the trust land base and ultimately tribal jurisdiction and sovereignty.

Definition of Indian

Perhaps no other proposed amendment in S. 550 draws as much attention as the definition of who is Indian and therefore eligible to inherit Indian land in trust. While we are appreciative of the expanded version of the definition contained in S. 550, a preferred alternative has been drafted by several other organizations testifying today and ILTF would be supportive of that language. Particularly as it relates to the definition contained within the Indian Reorganization Act and pertains to current owners of trust land, two significant additions.

Passive Trust

As with the provisions for joint tenancy, the establishment of "passive trust" status for "non-Indians" raises many concerns about jurisdictional issues between tribes and the states and counties. This clearly puts the land base at risk and it is difficult to see how the trust responsibility to the beneficiary is being served by such an action.

We have been informed anecdotally that relatively few people of no Indian blood would be included in such a construct. The primary recipients of passive trust status would be Indian people that no longer fit under the definition of Indian. Should the definition issues be worked out, passive trust may have some application that could benefit many people.

It is a bit surprising to see this provision contained in this bill. The administration of trust lands with passive trust interests contained within those allotments would be greatly increased. It would be especially difficult to exercise management practices on these allotments without the potential of representing passive trust holders by default. In those instances, the line between passive and active trust becomes blurred and the courts may be asked to intervene.

Partitioning of Land

We have not yet had sufficient time to examine the effects that the amendments related to partitioning of the allotments may have on ownership patterns, tribal or individual interests. I would ask the Committee to remain open to receiving additional comment on these provisions from ILTF.

Uniform Probate Code

ILTF has had the opportunity to review the Uniform Probate Code drafted and presented to the Committee by the Indian Land Working Group with support from the California Indian Legal Services and National Congress of American Indians. This Code provides the necessary components that the Committee seems in search of in terms of providing a uniform basis for intestate probates across Indian Country. We would recommend that the Committee adopt the Uniform Probate Code as presented by ILWG.

Additional Suggestions

Should the Committee proceed with S. 550 as written, ILTF would recommend that an amendment be added that directs the Secretary to procure legal advice relating to probate matters and make those services available to all undivided interest holders prior to implementation of the provisions of the Indian Land Consolidation Act 2000 Amendments and those contained within S. 550. This will ensure that Indian people will have knowledge about their options and assist them in understanding the complexity of this probate process.

Thank you for the opportunity to appear before you today and have this discussion. The Indian Land Tenure Foundation stands ready to assist the Committee and Congress in further development of S. 550 or subsequent legislation directed toward resolving Indian land issues.

**TESTIMONY OF CRIS E. STAINBROOK, PRESIDENT OF THE
INDIAN LAND TENURE FOUNDATION (ILTF)**

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS

April 30, 2003

**Regarding S. 519, the Native American Capital Formation and Economic
Development Act of 2003**

Chairman Campbell, Vice Chairman Inouye, and distinguished members of the Senate Committee on Indian Affairs:

My name is Cris Stainbrook. I am Lakota and I serve as the President of the Indian Land Tenure Foundation (ILTF). The Indian Land Tenure Foundation is a relatively young non-profit organization that was created by a community of Indian people concerned with Indian ownership and management of land. Our mission, as directed by the community, is to strategically work toward a goal of having all land within the boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest in Indian ownership and management.

On behalf of the ILTF Board of Directors and community, I thank you for this opportunity to present some perspectives and thoughts on S. 519 and also provide you with some information about our organization and work.

Four years ago a community planning process began with Indian people that had been working on Indian land issues for many years. The impetus for this planning process was the Community Ventures Program of the Northwest Area Foundation. The Community Ventures Program was designed to allow communities to develop 10-year strategic plans for reducing poverty and provide each community with substantial funding to assist in implementing the plan. In the case of the Indian Land Tenure Community, the Northwest Area Foundation drew the direct connection between the ownership and effective management of land and poverty on many of the country's Indian reservations.

The community planning process took place throughout the eight-state region of the Northwest Area Foundation but involved Indian people from throughout the nation as well. In total, several hundred Indian people participated in the planning process by providing input, writing sections of the plan, and providing comments on the initial drafts. Ultimately, the three-year process culminated in a strategic plan that the community felt would solidify the land holdings of Indian tribes and people, allow a greater self-determination, and would allow their most basic asset, land, to once again become a source of sustenance.

The community plan describes a course of action for the community to follow. The initial step was to create the Indian Land Tenure Foundation (ILTF), an institution that functions as a community foundation but with a very specific focus on resolving Indian land issues and creating land-based businesses. It is the role of ILTF to recruit resources and distribute those resources in a manner that will effectively accomplish the mission. In certain instances, the Foundation will operate programs when there is a lack of existing land programs in Indian Country.

In addition to the mission statement mentioned earlier, the community identified four strategies for the Foundation and the community to work on. Those strategies include:

- Educate every Indian landowner about land management, ownership and transference issues so that knowledge becomes power when decisions about land assets are made.
- Increase economic assets of Indian landowners by gaining control of Indian lands and creating financial models that convert land into leverage for Indian owners.

- Use Indian land to help Indian people discover and maintain their culture.
- Reform legal mechanisms related to recapturing the physical, cultural and economic assets for Indian people and strengthening sovereignty of Indian land.

The completed strategic plan allowed the Indian Land Tenure community to enter a 10-year partnership agreement with the Northwest Area Foundation. The community agreed to meet a series of benchmarks that included measures regarding the return of alienated reservation lands to Indian ownership and the reduction of the number of undivided interests in the allotments. In return, Northwest Area Foundation provided a grant of \$20 million to the Indian Land Tenure Foundation for operating costs, grants to local tribal efforts, and research and development of new methods to resolve this complex of land issues in Indian Country.

Not surprisingly, many in the community pointed toward, and much of the work of ILTF is directed toward, resolving Indian land issues that arose from two specific federal policies—allotment of the reservations and termination of tribal status. In both cases, substantial land holdings that had been guaranteed by treaties and executive orders for the exclusive use and occupation by Indian people were lost to non-Indian ownership. Through the provisions of the General Allotment Act of 1887 and subsequent Acts, more than 90 million acres of Indian land passed out of Indian ownership. The termination of tribal status led to the loss several million more acres of Indian land.

The loss of this land has created great difficulties for the tribes over the past 115 years. The checkerboard pattern of land ownership on reservations continues to foment jurisdictional battles between the tribes and the states and counties. And, the lost revenue that could be generated from the lost land base is substantial. In the Great Plains Region the tribes lost approximately 5,112,000 acres of land between 1887 and the passage of the Indian Reorganization Act in 1934. Simply leasing the lost land for grazing and receiving the Department of Agriculture's cash rent estimates for grazing land, the tribes would have received an additional \$51 million in 2002 and nearly \$3.5 billion since 1934. If even one-quarter of the land were leased at the higher cropland rates, the lost revenue in 2002 would be nearly \$100 million.

As devastating as the loss of land has been, the more insidious outcome of the General Allotment Act has been the creation of the undivided interest or fractionated ownership of the Indian allotments. This pattern of ownership has effectively rendered millions of acres of Indian land unused, unmanageable, and in constant jeopardy of being taken out of Indian ownership. This, of course, says nothing of the large administrative costs borne by the federal government and the tribes in maintaining ownership records and distributing income from the allotments to the correct owners.

The Committee members are well aware of the fractionated ownership issues and have heard testimony on several occasions over the past several years about the magnitude of the problem. The total number of interests in the 183,000 existing allotments or tribal tracts now totals more than 3 million. A number of allotments have ownership patterns which are now dividing at exponential rates every few years.

Anecdotally it is estimated that as many as 10 percent of the allotments are either completely unused or illegally used without lease payments to the owners because the properties ownership is so fractionated that tracking is virtually impossible. Beyond this are additional allotments that could be used for relatively advanced economic development but the difficulties in reaching agreement among so many owners remains an impediment. These are particularly distressing conditions when every opportunity for appropriate development in Indian Country is so important.

The cost to the federal government is staggering. Over the past several months, ILTF has tried to estimate the federal administrative costs of managing each ownership record. The best estimate that we could arrive at is \$71 per year per ownership interest. Our discussions with Bureau of Indian Affairs (BIA) field staff suggest that this is an extremely conservative estimate. The costs may well exceed \$100 per interest. The figures would put the total costs of administration between \$213 million and \$300 million per year.

As the Committee is aware, the BIA has operated a pilot project for land consolidation since 1998. While the project has had some qualified success, it is clearly not at a scale that can keep pace

with the rate of increase in fractionation of the land ownership. The \$21 million projected for the pilot projects in the next fiscal year is but a drop in the bucket as to what is needed to resolve the problem. To that point, an ILTF consultant recently calculated that it would require \$1.25 billion to buy out all the existing undivided interests throughout Indian Country. This figure should in fact be considered very conservative.

It is in this context that ILTF would agree with the findings outlined in S. 519. The land issues in Indian Country must indeed be resolved if economic development is to occur on a significant scale. And further, that additional capital must be brought to bear to achieve a scope and scale of enough significance to be effective. However, Indian self-determination is a fundamental core value of ILTF and that self-determination is not limited to the political sector but also includes economic aspects. Therefore, while we very much appreciate the intent of S. 519, we do not see the need for the federal government to create the vehicles for investment in Indian Country. The creation of such entities is better left to the Indian communities that can adapt the disciplines of the private capital market to their own cultural settings. This is not to say that there is not a role for the federal government in fostering the economic development and capital investment in Indian Country through the application of monetary resources. Indeed, those resources certainly are important to address some of the failures of the capital market system in Indian Country as they have been in addressing similar failures in other communities.

Indicative of our concurrence with the findings and land-related goals of S. 519 is ILTF's work over the past year to develop a private capital investment mechanism that could be applied to the consolidating of undivided interests and limited recovery of alienated land within reservation boundaries. Through our developing relationship with the Native American Bank Community Development Corporation, the investment mechanism will also include opportunities for private and public capital resources to be brought to bear in the development activities on Indian land. Affordable housing development will be of primary concern initially.

The Indian Land Capital Fund is designed to be an equity investment pool and as such will provide Indian Country with a relatively new model of financial investment in Indian land. To date, most financial investment related to Indian land has been through debt financing. The benefit of the equity investment is that it would help to leverage debt and would allow the Fund to develop more rapidly and larger.

The design of the Capital Fund will incorporate aspects of the BIA's Consolidation Pilot Projects but will be assisted through the application of ILTF and NACDC's non-profit activities including but not limited to estate planning, financial counseling, and technical assistance. Other significant aspects of the Indian Land Capital Fund include:

- Initially capitalized through a combination of philanthropic, tribal, government and private sources.
- Allows the tribes to own title to their land.
- Will work with all holders of undivided interests not just those with less than 2 percent interests to prevent further fractionation from occurring.
- Provides for a network of local sites that receive common technical assistance and training.
- Makes provisions for recognizing the individual ownership rights of Indian people and provides technical assistance and guidance in consolidating undivided interests while preventing future fractionation of ownership.
- Allows Indian people and tribes to build ownership interests in the investment pool.
- Adds value to the land through development.
- Becomes a long-term, self-sustaining, for-profit concern.

The financial vehicle we are proposing and constructing will not be without cost to the federal government. Indeed the undivided interests of Indian Country are of the federal government's making and it will need to provide resources to resolve that problem. However, the Capital Fund that is being created will be able to leverage between 5 and 10 dollars of philanthropic, tribal, or private capital to every federal dollar. Federal contributions to the Capital Fund could come in several forms including the provision of seed capital, tax credits for investors, or a program similar to the Energy Savings Performance Contracts found in the recent energy bill. In the case of the latter, it would be the savings that accrue to the BIA administrative costs that could be shared with the Indian Lands Capital Fund. When successfully implemented, the mechanism would provide a scale of activity in reducing

fractionated ownership throughout Indian Country that the BIA is unable to achieve with the current budget allocations for the Consolidation Pilot Projects.

We have had some very preliminary conversations with the BIA and several tribes regarding the Indian Land Capital Fund. It is our intention to continue those discussions with the intent of obtaining at least some portion of the funds dedicated to the Pilot Projects for next fiscal year for the partial capitalization of the Capital Fund. If successful in obtaining these funds, the Indian Land Capital Fund will become operational during the Fall of 2003 at a minimum of four tribal sites.

Ultimately, we believe this model investment program will return decision making and control over their land asset to the tribes and Indian people. Currently the control and management of the asset is subjected to changes in federal policy, law and regulations. These changes seemingly are driven more by exasperation and expedience to resolve the overwhelming size and growth of the fractionation problem rather than resolving the problem with the welfare and concerns of Indian people in mind.

Thank you for the opportunity to appear before you today and have this discussion. The bill that is the subject of today's hearing has appropriately targeted two significant issues in the economic development of Indian Country—lack of investment capital and broadly applied analysis of the impediments. The Indian Land Tenure Foundation stands ready to assist the Committee and Congress in pursuing the goals of S. 519 through the Indian Land Capital Fund and our many other activities.