

# NO QUICK FIXES

A LOOK AT  
THE BUREAU OF INDIAN AFFAIR'S  
INDIAN LAND CONSOLIDATION  
PILOT PROJECT

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# HISTORY

*In Indian Country, any program administered by the Bureau of Indian Affairs (BLA) is subject to inquiry since those programs affect the lives of Indian people. In 1983, Congress passed the Indian Land Consolidation Act (ILCA) to:*

- ... **prevent further fractionation of trust allotments**
- ... **consolidate allotted fractional interests and ownership into usable parcels**
- ... **consolidate fractional interests in a manner that enhances tribal sovereignty**
- ... **promote tribal self-sufficiency and self-determination**
- ... **reverse the effects of the allotment policy on Indian tribes**

The Indian Land Consolidation Pilot Program, which began in 1999, is a result of Congressional Acts and Supreme Court decisions that sought to remedy problems associated with fractional land.<sup>[1]</sup>

Section 207 of the ILCA (1983) allowed tribes to consolidate fractional interests of two per centum or less of the total acreage in such tract and which was incapable of earning \$100 the year before the owner's death. This "escheat" provision also prohibited allottees with 2% or under fractional interests from willing their interests to their descendants. As a consequence, heirs and devisees were forced to escheat, without compensation, their fractional interests to the tribe.

The Supreme Court has twice ruled against Section 207. First, the Court in *Hodel v. Irving*, 481 U.S. 704 (1987) ruled that Section 207 was unconstitutional, but did not opine on the revised amendment then before Congress.

In 1984, Congress amended Section 207 of the ILCA: As amended Section 207 differs from the original in three relevant respects: it looks back five years instead of one to determine the income produced from a small interest, and creates a rebuttable presumption that this income stream will continue; it permits devise of otherwise escheatable interests to persons who already own an interest in the same parcel; and it authorizes tribes to develop their own codes governing the disposition of fractional interests."<sup>[2]</sup>

In *Babbitt v. Youpee*, 519 U.S. 234 (1997), the Supreme Court ruled the amended 207 was unconstitutional because it violated just compensation in violation of the Fifth Amendment.

As of May 1991, 16,404 escheatments<sup>[3]</sup> were made under Section 207. These escheatments were from 11 BIA Western Region reservations, with the exception of escheatments from the Yakama Reservation in the BIA Pacific Region.<sup>[4]</sup> These writers could find no clear documentation of what has happened with these escheatments. Ross Swimmer, Special Trustee of OST, recommends that the original owners should be repaid for their escheatments but that the land should remain in trust with the tribes.<sup>[5]</sup>

## *The Primary Emphasis*

The strongest reaction to the Youpee decision came from the Office of the Special Trustee (OST). The OST Strategic Plan of April 1997 stated, "the 1997 *Youpee v. Babbitt* Supreme Court decision called into question the legality of the escheated property since 1984, further complicating the fractionation problem."<sup>[6]</sup>

In Specific Actions Required, the OST said, "Legislation is needed which would consolidate the large number of existing fractionated interests and prevent further fractionation. This alone would remove a primary obstacle to the efficient administration of the trust management systems...."<sup>[7]</sup>

In 1998, Congress appropriated \$5 million in funding to begin in 1999 for the Indian Land Consolidation Pilot Project (ILCPP), also known as the “Buy Back Program.” The primary goal was to consolidate allotted fractional interests into tribal land bases and the secondary goal was to reduce the administrative costs of managing fractional interests.

In 2000, amendments to the Indian Land Consolidation Act codified the pilot program under 25 U.S.C., Chapter 24 § 2212 – the Pilot Program for the Acquisition of Fractional Interests. Congress and the BIA hoped to bring tribes into cooperative action, via the ILCPP, in on-going efforts to stop the continued fractionation of Indian land.

The 1999 Making Omnibus Consolidated and Emergency Supplemental Appropriation for the ILCPP<sup>[8]</sup> was initially carried out by the BIA. In 2000, there was a significant change. Under the Department of Interior and Related Agencies Appropriation Bill, funding “to consolidate all trust reforms activities”<sup>[9]</sup> shifted to the Office of the Special Trustee. Essentially, the Pilot Program became an OST program administered through the BIA.

The BIA Midwest Regional Office established the concept for the Indian Land Consolidation Pilot Project at the Great Lakes Agency, Ashland, Wisconsin. The staff designed the processes used to initiate the Pilot Program. Although a guide was published, the processes evolved throughout the course of the pilot.

According to Robert Jaeger, Director of the BIA Land Consolidation Office, “Congress wants to reduce the rate of fractionation. Congress wants to see if there are willing sellers and what are the standard operation procedures. Congress considers this an opportunity to see what works and what doesn’t.”

Initially, thirty-six reservations were nominated for the selection process based on the following criteria: total interests allotted; total acreage allotted; interests of 2% or less; acreage of 2% or less; level of fractionation 2% interest per 2% acreage; level of fractionation rank; rank order of 2% or less; total of ranks; and combined ranks. Finally, three Ojibwe reservations in Wisconsin - Bad River, Lac du Flambeau and Lac Courte Oreilles, were selected to participate in the Pilot Project.

In compliance with FY99 Appropriations for the Land Consolidation Pilot Project, the three reservations and the BIA signed Cooperative Agreements [see Appendix 1] with the primary emphasis to acquire fractional interests representing 2% or less ownership. The BIA worked with the three reservations to develop procedural guidelines and processes to fulfill the program’s objectives. Each tribal government received \$5,000 to:

- ... **notify potential sellers;**
- ... **create publications in local newspapers;**
- ... **periodically reserve meeting space for potential sellers to complete the sale;**
- ... **provide prospective sellers with pertinent documents; and**
- ... **assist the Great Lakes Agency in locating potential sellers.**

In turn, each tribe passed tribal resolutions [see Appendix 2] to formally approve their participation in the ILCPP.

Robert Jaeger considers the tribal resolution more important than the Cooperative Agreement. He said, “The Cooperative Agreement is not a very involved statement of what the tribe will do. It says how they will do outreach, publicity. Some tribes offer office space. The Agreement is essentially our agreements in those areas. In the Agreement, we, the BIA, say we will consider their input in the acquisition of tracts. More important is the tribal resolution. We, the Bureau, go on site before the Council and ask for the resolution – as government to government.”

Jaeger goes on to say that there is no Cooperative Agreement attached to the tribal resolution. Jaeger stated, “There is no requirement for the Cooperative Agreement. There is no requirement for the resolution. These are made so there is not a question of being in the tribe’s interest. To date all tribes have a Cooperative Agreement and tribal resolutions. We want the tribe’s support. We may or may not later get the Cooperative Agreements.”

The Bad River Tribe informed members of the ILCPP by publishing this article in the tribal newspaper:

*“The Bureau of Indian Affairs established a land acquisition program in 1999 to consolidate fractionated ownership of trust or restricted Indian lands. Only those people who want to sell their fractionated interests need participate; the purchased interests will only be transferred to the tribes; and will remain in trust—the price offered by the BIA for fractionated interests will be the appraised fair market value. The Land Consolidation Pilot Project is an important step forward in Indian country. It will promote tribal self-determination, facilitate appropriate and economically beneficial land use, and contribute to long overdue reform for the management of trust funds.”<sup>[10]</sup>*

Fond du Lac Reservation in northern Minnesota joined the Pilot Project in 2000. Diane Myrsik of the Fond du Lac Land Office said Fond du Lac printed the names of all known heirs in the reservation paper in 2003. People contact her if they want to sell and she sends them on to the Ashland office.

After publication notices, sellers on both reservations did come forward and the Indian Land Consolidation Pilot Project was in business to buy up fractionated Indian land.

## THE THREE PHASE PROCESS

According to the Booz-Allen-Hamilton (B-A-H) Report of 2002, once tribal members are made aware that the BIA via the ILCPP is in the process of acquiring fractionated interests, a three phase process begins: the Initiation; the Consolidation; and, the Closing Phase.

In the **Initiation Phase** an individual interest holder makes contact with the agency office by walk-in, mail, telephone, or e-mail. A query of the Trust Fund Accounting System (TFAS) is made to see if the landowner has an established IIM (Individual Indian Money) account.<sup>[11]</sup>

In the **Consolidation Phase**, the agency creates a Grantor’s Inventory. First, the ownership on the individual’s Indian Heritage Card (IHC) and the Owner Status Report (OSR) are prepared. Next, the individual’s inventory is downloaded from the Great Lakes Agency Database (GLAD). The undivided interests are aggregated and the equivalent fair market value is calculated. The grantor then receives an application for consolidation. A record is created in a database from which the deed and a “Sheet A” are produced using the Grantor’s Inventory. This is done by deleting the lines dividing the allotments and aggregating the fractions. In other words, the multiple interests are consolidated on “Sheet A.”<sup>[12]</sup>

The process goes through several handoffs and audits. Requisitions over \$10,000 are sent to the Midwest Regional Warrant Officer for signature. The Agency Warrant Office has signature authority for requisitions under \$10,000.<sup>[13]</sup>

According to Robert Jaeger, requisitions over \$10,000 no longer follow the above process. He did not say exactly when the change was made but informed this writer that the above is not valid or relevant information. All checks, no matter the amount, according to Jaeger, follow these steps: A request for a money transfer from the BIA is made; the money transfer request goes to the OST in Rushton, Virginia. There, the money is put in an Individual Indian Money account (IIM). The OST then issues the grantor a check. “I can’t tell you offhand how many requisitions over \$10,000 are made, but I do know, as of today, the average check issued is for \$5,100” said Jaeger.

The Deed to Restricted Indian Land is prepared by a Realty Clerk. Information for the preparation of the deed includes:

- ... **The owner's (Grantor's) name, marital status, enrollment number and current residence;**
- ... **The Grantee as the United States of America [in Trust for the tribe in which fractionated interests are located];**
- ... **Total consideration of amount of the deed;**
- ... **Authority – Indian Reorganization Act, which reads: This conveyance is made pursuant to the provision of the Act of June 18, 1934 (48 Stat., 984). In accordance with the 1999 Omnibus Appropriation Act, Title is encumbered by the United States of America until the purchase price has been reclaimed from revenue attributed to this land inters;**
- ... **Sheet "A" – consolidated interest of an owner. From there, the Grantor executes the deed in front of a notary public and signs for the check. If the Grantor holds an IIM account, three additional forms are signed:**
  - **OTFM-01-005 Authorization for Disbursement of Funds;**
  - **OTFM 01-006 Change of Address Requests; and**
  - **W-9, Request for Taxpayer identification number and Certification.**<sup>[14]</sup>

The Superintendent completes approval and signs the deed. The deed is essentially a deed of trust with the Secretary as the trustee, per ILCA, Section 2209. Jaeger explains that the title is held by the Secretary of the Interior because "the Secretary of the Interior is the trustee for Indian people, and is required by law to hold in title for the United States Government."<sup>[15]</sup>

In the **Closing Phase**, the Realty Department records the consolidation data to the main record of the Seller. The original deed is sent to the Aberdeen Title Plant (ATP) for recordation. The deed is returned to the Agency, which prepares the file for retirement. The transfer of the undivided interests is recorded on the allotment cards, heirship cards and the GLAD system.<sup>[16]</sup>

## THE APPRAISAL PROCESS

It should be noted that an appraisal process precedes these three phases. Under the ILCA, according to Jaeger, the BIA is mandated to appraise the land at comparable rates of non-Indian owned land, based on income and future income. This is a requirement on all appraisals as set out by Congress.

Jaeger explained that the BIA is short of appraisers, saying, "Right now, the Office of Appraisal Services in the Office of Special Trustee needs to contract out for some services in some other states."

One source said, "The BIA does their own appraisal. The Bureau's land value far exceeds the tribe's appraisal of land value. People got a lot of money for selling to the BIA. The tribe's appraisal is for about \$350 an acre. The BIA's appraisal is based on surrounding land values of \$1,500 to \$2,000."

According to this source, the Tribal Secretary estimates that to acquire land bought by the BIA at these rates, this reservation would owe the BIA a minimum of \$15 million instead of approximately \$2.7 million.

"Right now, it will never be in the best interest of the tribe to acquire these interests from the BIA because it is too expensive to have to repay the BIA," says this source.

Jaeger says, "It is a requirement that the purchase price be repaid. In effect, we hold lien on the title for any income coming off the land. This income is returned to the acquisition fund for that particular tribe."

There is an assignment of income on the lease income according to Jaeger. "The income generated is placed in an acquisition account for the tribe and can be used for the purchase of additional fractionated interests for that reservation. In this way the purchase price is repaid by the tribe, the individual's income is not used to repay."

The BIA maintains an acquisition fund for each tribe. In compliance with the Indian Land Consolidation Act, acquisition monies can only be used for the purchase of additional interests.

Jaeger goes on to explain the benefits to the sellers, “They get the value of their property. The BIA appraiser determines the value of the land and divides it by the number of owners. This is what determines what the individual gets.”

Therefore, once the appraisal is done to determine what an interest is worth, the process moves from Initiation to Closing.

#### *The ILCPP Process Timeline and Fractional Outcomes*

Overall, the ILCPP process takes from 21 to 90 days. The stated effectiveness objective of the ILCPP is the number of interests purchased which are less than 2% relative to total interests purchased. The following table<sup>[17]</sup> shows the effectiveness results for the original three reservations involved in the ILCPP:

Total number of undivided interests purchased	35,809
Total number of undivided interests of 2% or less purchased	32,610
Percentage of total interests, which were less than 2%	91.07 %

The ILCPP was considered successful in its attempt to slow the rate of fractionation among the three reservations. A report<sup>[18]</sup> issued by the Department of Interior cites specific figures for the three reservations:

- Bad River* – majority ownership in 287 of 652 total allotted tracts
- Lac Courte Oreilles* – majority ownership in 176 of 326 total allotted tracts
- Lac du Flambeau* – majority ownership in 208 of 245 total allotted tracts

Overall, it is hard to track reports regarding fractionated interests, the Indian Land Consolidation Pilot Project and BIA/OST activity. In March 2000, the Supreme Court ordered mandatory reports as a part of trust reform in response to the *Cobell v. Norton* case. This Status Report to the Court is a quarterly report. In our research we could not find an annual report on the ILCPP although Status Reports to the Court 8 through 14 covers issues related to fractionation.

## PAYING A ROBBER

While the Department of Interior report claims success of slowing the rate of fractionation, interviews with tribal sources reveal perceptions that the program failed to address certain issues and/or exacerbated other problems.

When the ILCA 2000 amendments came into existence there was a rush on fee patents. One source said, “The ILCA limited inheritance of how my children could inherit if not enrolled. Rather than risk losing land allotment, people wanted land taken out of trust status so the individual becomes sole owner. People with whole allotments wanted to avoid their land (allotment) going under the ILCA. Say for example, my grandmother gave my dad her allotment who in turn gave me the whole allotment. Say, my daughter is not enrolled. In that case, the government limits my ability to give my allotment to family. So, I take the allotment out of trust, and sure, now I have to pay taxes on it, but my daughter can have it, the allotment, for her life. If, when she dies, it reverts to the tribe.”

This source goes on to say, “I see this as the government, Congress, trying to force tribes to develop probate codes.”

As of this writing, proposed revisions under S. 1721, the American Indian Probate Reform Act of 2004, are in the House of Representatives.

All sources interviewed were of the same mind that the Indian Land Consolidation Pilot Project did not solve the rate of fractionation as Congress hoped.



Diane Myrsik, Fond du Lac Land Office says, “Without probate reform, the land stays in the name of the person deceased. We can own all the other shares, but that one unbought share continues to fractionate because it is still in (the) deceased’s name. We need probate changes.”

Another person interviewed elaborates by saying, “Say the tribe or BIA couldn’t get enough people together on one piece of land. So say, on one piece of land an individual died without naming an heir. In that case, the interests are continually breaking down and the BIA needs 51% consensus to buy up interests and we, or the BIA, couldn’t get enough people together to agree. It just keeps fractionating.”

This individual offers a more personal example. “When asked to sell interests on this reservation, the home reservation, a lot of people feel they are selling part of themselves. My auntie will not sell her interests on our reservation, even though she is willing to sell interests on other reservations. I can sympathize with her but her interest is such a minute part that there is no worth to it. Without a will, it will continue to fractionate to her children and brothers and sisters.”

In 2003, Wayne Nordwall, Director, BIA Western Region, stated, “When the projects started, there were approximately 87,000 interests on three reservations. To date, we have purchased over 40,000 interests on those three reservations. However, because of the runaway growth of fractionation, we still have the same number of outstanding interests as when the projects began.”<sup>[19]</sup>

Even Jaeger says, referring to the Pilot Project, “Congress wants to reduce the rate of fractionation. This is not the answer. The answer is probate reform, inheritance reform.”

All sources complained about the lack of efficiency within the Bureau system. Jaeger said, “We have too many purchases to deal with administratively. We need an automated internal process to be efficient. Right now, everything is labor intensive, needing to do by hand. It is an inefficient process. We need better access to ownership data nationally. Right now it has to be done manually which is time consuming.”

As mentioned under Appraisals, the repayment of the purchase price to the BIA is another source of contention to many tribal members. There are no provisions in the Federal Code of Regulations (CFR) or U.S. Code (U.S.C.) that sets forth a timeframe for tribes to buy back land acquired under the Indian Land Consolidation budget or for the BIA to sell the land back to the tribes. As stated previously, any income derived off the purchased land is held in an acquisition fund by the BIA for the tribe. This money cannot be used for any purpose other than to buy fractionated interests. The land itself, which has been purchased, is held in trust in accordance with ILCA § 2209.

Robert Jaeger spoke about a possible resolution to repayment for acquisition funds. “The Secretary of Interior can exclude repayment because land produces little or no income. This has not been done to date at this point. My office has requested ILCA to forgive, forgive is not the right word to use, but I’ll use it for the purpose of explaining here, forgive repayment land cost for one reservation. But I don’t know the status of the request.”<sup>[20]</sup>

Jaeger provided an example of land where repayment might not have to be made. “In the Midwest, with a 50 year cycle of timber harvest, it would be another 50 years to see a profit. That’s a total of 100 years of administrative costs to the BIA. It might make sense to forgive that repayment. However, in the Dakotas, where there might be yearly income from farming and grazing, they might not be eligible to be forgiven repayment.”

One source said, “The BIA owns the land and says you owe us this money. The land the BIA currently holds, in order to acquire this land at rates bought by the BIA, we would owe the BIA \$15 million. The tribe can cut out timber, but the BIA takes the first cut of the profit. Once the amount the BIA paid for the property has been repaid, then the tribe can make a profit, but few will ever be able to make money. I thought the pilot projects were successful, but now I think it is crazy. If the Bureau, Congress, was doing this to right a wrong, which goes all the way back to the Allotment Act, if they are doing it to right a wrong, that is good. Otherwise it is like paying a robber to give back what they stole from you.”

## MODERATELY EFFECTIVE

As cited by the Office of Budget and Management, the B-A-H report provided recommendations<sup>[21]</sup> for the ILCP and made recommendations for the BIA if the pilot program was to be deployed nationally.

Recommendations for the ILCPP included:

- ... **centralize record audit capacity**
- ... **mandate use of Sheet A**
- ... **disburse land consolidation funds at the regional level**
- ... **centralize Agency Office records storage**
- ... **formalize standard operating procedures**
- ... **establish an agency level customer support capacity**
- ... **develop and implement a case management system**
- ... **create performance measurement/management process**
- ... **develop and implement activity-based costing to track total administrative costs**
- ... **provide initial and sustained training**
- ... **provide necessary outreach to interest owners**
- ... **eliminate probate backlog**
- ... **minimize or eliminate non-value added financial accounting**
- ... **pre-reconcile hard copy and automated data of Land Title Records**

For BIA national deployment, the recommendations were:

- ... **develop/implement tribal cooperative agreements**
- ... **establish robust, department-wide outreach**
- ... **develop departmental policies and procedures**
- ... **communicate negative impact of exponential fractionation growth**
- ... **update asset appraisals**
- ... **eliminate probate backlog**
- ... **field a case management and customer relationship management capability**
- ... **determine policy for handling “lost” interest holders**
- ... **minimize or eliminate non-value added financial accounting activities**
- ... **pre-reconcile hard copy and automated Land Title Records**

In 1999, Kevin Gover, former Assistant Secretary for Indian Affairs, provided testimony in regard to the success of the ILCPP, “The opportunity to sell fractional interests spread quickly by word of mouth and the BIA has been inundated with requests to sell interests. To date, over 8,000 interests have been purchased and over 4,000 acres have been returned to the tribes. Over 600 deeds (combining multiples sales of fractional interest into one document) have been recorded and the need for over 250 probate and new IIM accounts have been eliminated.”<sup>[22]</sup>

Appearing before the Subcommittee on Interior and Related Agencies Committee on Appropriation in 2000, Thomas Thompson, former Principal Deputy of the OST said, “We need to expand the pilot land acquisition program to consolidate fractional interests and support the reopening and acquisition of “Youpee” interests in allotted lands... resolving land ownership fractionation is key to trust reform efforts.”<sup>[23]</sup>

The BIA and OST’s assessments of the pilot projects’ success and the need for expansion led to budget increases. In 1999 and 2000, the program was budgeted at \$5 million. The pilot program’s budget increased to \$9 million in 2001 and \$11 million in 2002; it decreased to \$8 million in 2003 and increased to \$21 million in 2004.

Unlike budgets for 1999–2001, Congressional budgets for Indian land consolidation for 2003-2004 do not allocate specific sums for administrative purposes. Allocated administrative sums were \$250,000 for 1999-2000 and \$1 million for 2001. Beginning in 2003, Congressional budgets are lump sums to be expended by the OST. Sums not expended can be carried over into the next fiscal year. Records show that unobligated balances carried forward were \$3 million for 2000 and \$4 million for 2001.<sup>[24]</sup>



A 2004 BIA memorandum from Robert Jaeger states, “Presently, there are seven Indian reservations located in four states that are participating in the program – Bad River, Lac du Flambeau, Lac Courte Oreilles, and Red Cliff in Wisconsin; Keweenaw Bay in Michigan; Fond du Lac in Minnesota; and Rosebud in South Dakota.”<sup>[25]</sup>

Robert Jaeger adds, “For Fiscal Year 2004, the pilot program is expanding to six additional reservation sites – Pine Ridge and Standing Rock in South Dakota; Gila River in Arizona; the Winnebago in Nebraska; the Crow in Montana; and the Navajo. Expanded sites also include the Quinault in Washington State and the Quapaw in Oklahoma.”

Wayne Nordwall, Director of the Western BIA region said in 2003, “To date, the program has purchased 74,626 fractionated ownership interests from willing sellers. Of the total interests acquired, 90% were interests of less than 2% ownership in the respective tracts of land. Over the past 4 years, \$29.1 million has been expended to buy these interests. The program has acquired the equivalent of 46,498 acres for the pilot program reservation... [this] office has identified 156 allotted reservations nation-wide. The current plan is to expand the number of reservation sites based primarily on the number of highly fractionated tracts of trust/restricted Indian land and available funding.”<sup>[26]</sup>

According to Ross Swimmer, Special Trustee, as of March 31, 2004, 78,321 individual interests were purchased that equaled approximately 49,155 acres.<sup>[27]</sup>

The OST/BIA’s resolve in expanding the pilot program contrasts with an Office of Management and Budget (OMB) assessment that rated the pilot program as only “moderately effective.” Although the OMB assessment noted that results had been achieved, new measures were needed. In its evaluation, the pilot program received a rating of 75% for purpose, 50% for planning, 70% for management, and a rating of 75% for results/accountability.<sup>[28]</sup>

The OMB assessment noted the average price paid for ownership interests for 2002 was \$632, an increase of \$349 over the previous year’s average price of \$283.

The OMB assessment concluded the pilot projects needed to be better targeted to statutory purposes and objectives, such as reducing federal trust management operations and coordinating federal purchases with tribal development funds before the program be made permanent.<sup>[29]</sup>

The OMB assessment also noted there was no linkage between budgetary resources and program workloads and performance measures; the BIA should develop a strategic plan for expanding the land acquisition and consolidation program to other regions and reservations; alternative strategies should be assessed.<sup>[30]</sup>

In addition, the OMB supports the recommendations in the B-A-H (Booz-Allen-Hamilton) Report, as stated previously.

At the time of this writing, S.1721, the American Indian Probate Reform Act of 2004, was before the House. The current section covering the ILCPP – Pilot Program for the Acquisition of Fractional Interests – would be amended as the Fractional Interest Acquisition Program. This revised amendment for Section 2212 would make several revisions relating to the manner in which it is carried out. One change is that the 3-year limitation placed on the program would be eliminated so the program would become permanent. The revised amendment would also authorize a \$75,000,000 appropriation for fiscal year 2005, \$95,000,000 for fiscal year 2006, and \$145,000,000 for each of the fiscal years 2007 through 2010 for purposes of carrying out the acquisition program.

Several other S.1721 revisions are designed to facilitate the administration of the acquisition program. For example, revisions for Section 2206 allow the Secretary to make program acquisitions in the context of probate proceedings (i.e., allowing the Secretary to exercise the “purchase option at probate” on behalf of the tribe).

## POINTS OF CONTENTION

The BIA, tribes and individuals profess to share the same goal – to consolidate fractional interests. However, the point of contention with the pilot project/land acquisition program is the BIA maintains strict control of the program’s functions.

Austin Nunez, Chairman, giving testimony for the Indian Land Working Group in 2003 before a Senate subcommittee, said the pilot program is a “secretarial pilot project.”<sup>[31]</sup> As such, the Secretary is represented through the BIA. Under the BIA’s direction, an individual sells their fractional interest, signs the deed, and the case is closed.

Most importantly, the BIA does not address the three alternatives open to tribes and individuals. A BIA memorandum stated: “any Indian owner within the above category (if he or she is concerned that the tribe rather than his or her heirs or devisees will take these interests) may purchase additional interests from co owners and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to co owners or relatives and reserve a life estate—rather than tribal, ownership. A third alternative is to partition the tract in such a way as to enlarge the owner’s interest in a portion of said tract.”<sup>[32]</sup>

The Indian Land Working Group calls for the implementation of a steady, long-term, adequately funded program that includes tribal and individual consolidation and acquisition of fractional interests, and the inclusion of tribes in the land acquisition pilot project and adequate funding for acquisitions.

However, the current amendment to Section 2212 excludes acquisition funds for alternatives for tribes and individuals. As such, Section 2212 undermines the ability for tribes to exercise self-determination. Also of concern is its deployment nationally. The OMB assessment, released in 2004, cited recommendations and concerns about the program. Yet, the OST and BIA have resolved to forge ahead with the program as it now stands. With a proposed budget involving over half a billion dollars, the program is a quick fix that may slow the problem but does not resolve it.

## CITED FOOTNOTES

*All sources, unless cited by name in the body of the text, requested complete anonymity.*

- 1) B-A-H Report, p. 6 (see Citation 11): Pursuant to the Court's decision [i.e., the Youpee decision], the Department [i.e., DOI] directed the BIA to initiate the Pawnee Pilot Project (otherwise known as the Youpee Pilot Project), to determine the process of and costs associated with reversing tribal escheats. The BIA determined that it needed to establish a project to determine the costs and various considerations on a National basis in attempting to comply with the Court's order. The results of Youpee prompted the BIA to look at ways and means of minimizing fractionation consistent with legal authority. These factors acted as the impetus for the creation of the ILCPP.
- 2) U.S. Supreme Court. *Babbitt v. Youpee* 519 U.S. 234. 1997
- 3) Briefing Report to the Chairman. Select Committee on Indian Affairs. U.S. Senate. Indian Programs: Profile of Land Ownership at 12 Reservations. Washington, D.C.: General Accounting Office, Feb. 1992, p. 7
- 4) Ibid.
- 5) U.S. House of Representatives. Hearing on S. 1721, The American Indian Probate Reform Act of 2004. Testimony of Ross Swimmer. June 23, 2004. Swimmer's full statement reads: "We also request a provision be added to S. 1721 that would provide a technical correction to address the decisions in *Youpee v. Babbitt* and *DuMarce v. Norton*. As mentioned above, the Supreme Court in Youpee held the escheat provision of ILCA as unconstitutional. In *DuMarce v. Norton*, the District Court for the District of South Dakota found unconstitutional a statute under which any interest of less than two and a half acres would automatically escheat to the Sisseton Wahpeton Sioux Tribe. As a result of these two decisions, the Department is faced with having to re-vest interests that escheated under both statutes back to the rightful heir. We request that Congress add a provision to S. 1721 declaring that any interest that escheated pursuant to these Acts be vested in the tribe to which they escheated unless they have been re-vested in the name of the heirs of the allottee by the Secretary since the escheatment. The provision should provide that the escheat of those interests to the tribes involved a taking by the United States and should provide compensation to the heirs of those escheated interests."
- 6) Summary of Trust Management Problems, Need for Action and Special Trustee's Strategic Plan Recommendations. April, 1997. August 25, 2004.
- 7) Ibid.
- 8) Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999 – Indian Land Consolidation Pilot: For implementation of a pilot program for consolidation of fractional interests in Indian lands by direct expenditure or cooperative agreement, \$5,000,000 to remain available until expended, of which not to exceed \$250,000 shall be available for administrative expenses: Provided, That the Secretary may enter into a cooperative agreement, which shall not be subject to Public Law 93-638, as amended, with a tribe having jurisdiction over the pilot reservation to implement the program to acquire fractional interests on behalf of such tribe: Provided further, That the Secretary may develop a reservation-wide system for establishing the fair market value of various types of lands and improvements to govern the amounts offered for acquisition of fractional interests: Provided further, That acquisitions shall be limited to one or more pilot reservations as determined by the Secretary: Provided further, That funds shall be available for acquisition of fractional interests in trust or restricted lands with the consent of its owners and at fair market value, and the Secretary shall hold in trust for such tribe all interests acquired pursuant to this pilot program: Provided further, That all proceeds from any lease, resource sale contract, right-of-way or other transaction derived from the fractional interest shall be credited to this appropriation, and remain available until expended, until the purchase price paid by the Secretary under this appropriation has been recovered from such proceeds: Provided further, That once the purchase price has been recovered, all subsequent proceeds shall be managed by the Secretary for the benefit of the applicable tribe or paid directly to the tribe.
- 9) 106 Congress, 1st Session, House of Representatives. Department of the Interior and Related Agencies Appropriations Bill 2000. Indian Land Consolidation Pilot.
- 10) Wabindato, Jim. "Bureau of Indian Affairs Land Consolidation Project." News from the Sloughs. Nov. 2000
- 11) Booz-Allen-Hamilton Report. Indian Land Consolidation Pilot Program. April 2002.
- 12) Ibid.
- 13) Ibid.
- 14) Ibid.
- 15) 25 U.S.C., Chap 24 § 2209 – Trusteeship Title of United States for any Indian or Indian Tribe: Title to any land acquired under this chapter by any Indian or Indian tribe shall be taken in trust by the United States for that Indian or Indian tribe.
- 16) Op Cit., B-A-H Report.
- 17) Ibid.

- 18) U.S. Department of the Interior. Status Report to the Court. Number Sixteen. February 2, 2004. p. 28
- 19) U.S. Department of the Interior. Hearing on S. 550, "The American Indian Probate Reform Act of 2003." Testimony of Wayne Nordwall. May 7, 2003.
- 20) 25 U.S.C., Chap 24 § 2213 – Administration of acquired fractional interests; disposition of proceeds: (b) Conditions (2) Exception – Paragraph (1) (A) shall not apply to any revenue derived from an interest in a parcel of land acquired by the Secretary under Section 2212 of this title after – (A) the Secretary makes a finding that (i) the costs of administering the interest will equal or exceed the projected revenues for the parcel involved; (ii) in the discretion of the Secretary, it will take an unreasonable period of time for the parcel to generate revenue that equals the purchase price paid for the interest; or (iii) a subsequent decrease in the value of the land or commodities associated with the land make it likely that the interest will be unable to generate revenue that equals the purchase price paid for the interest in a reasonable time.
- 21) Op Cit., B-A-H Report.
- 22) U.S. Department of the Interior. Hearing on S. 1586, "Indian Land Consolidation Act of 1999." Statement of Kevin Gover. November 4, 1999.
- 23) U.S. Senate. Subcommittee on Interior and Related Agencies Committee on Appropriations. Opening Statement of Thomas M. Thompson. April 4, 2000.
- 24) Department of the Interior. The Budget for Fiscal Year 2002. Appendix. Departmental Offices. p. 612.
- 25) U.S. Department of the Interior. Bureau of Indian Affairs. Indian Land Consolidation Office. Memorandum: March 2004.
- 26) Op Cit., Testimony of Wayne Nordwall.
- 27) Op Cit., Testimony of Ross O. Swimmer.
- 28) OMB Program Assessment Rating Tool (PART). Capital Assets & Service Acquisition Programs. Tribal Land Consolidation. Fall 2004 Budget.
- 29) Ibid.
- 30) Ibid.
- 31) U.S. Senate. Subcommittee on Indian Affairs. Testimony on American Indian Reform Act of 2003. Testimony of Austin Nunez. October 14, 2003.
- 32) Cited in *Hodel v. Irving*. Bureau of Indian Affairs Memorandum. March 2, 1983: "To assure the effectiveness of a will or heirship succession under state law, any Indian owner within the above category (if he or she is concerned that the tribe rather than his or her heirs or devisees will take these interests) may purchase additional interests from coowners pursuant to 25 CFR 151.7 and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to coowners or relatives pursuant to 25 CFR 152.25 and reserve a life estate, thus retaining the benefits of the interest while assuring its continued individual, rather than tribal, ownership. A third alternative, if feasible, is to partition the tract in such a way as to enlarge the owner's interest in a portion of said tract. Indians falling within the above category and who are presently occupying, or in any other way using, the tract in question should especially be advised of the aforementioned alternatives."

APPENDIX 1

LAND CONSOLIDATION PROJECT COOPERATIVE AGREEMENT  
BETWEEN THE \_\_\_\_\_ TRIBE/BAND AND THE BUREAU OF INDIAN AFFAIRS

**BACKGROUND INDIAN LAND CONSOLIDATION ACT 2000**

The Appropriation provides for the establishment of a land acquisition program within the Bureau of Indian Affairs to consolidate fractionated ownership of trust or restricted Indian lands. The \_\_\_\_\_ Reservation and \_\_\_\_\_ Agency within the \_\_\_\_\_ Region has been identified as an expansion site to acquire and process the necessary documents to effect transactions to reduce fractionated interests in Indian lands. The primary emphasis of the project would be to acquire those fractional interests which represent two percent or less of the ownership interests, especially those interests that would escheat to a tribe but for the Youpee decision, however, consideration will be given to acquiring interests greater than two percent at the program site.

**PURPOSE**

The purpose of this agreement is to establish a working arrangement with the (Name of the Tribe/Band) to fulfill the Congressional requirements as outlined in ILCA 2000. This agreement will serve as part of the Bureau's implementation plan for this project and will be submitted as an addendum to such plan for Indian Land Consolidation Office approval.

**PLAN**

The Tribal Government will be asked to assist the \_\_\_\_\_ Agency in accomplishing the following tasks:

1. Notification to potential sellers
2. Publication to potential sellers
3. Periodically reserving space for the meeting of potential sellers to consummate sales
4. Providing prospective sellers with pertinent documents
5. Assisting Agency in locating potential sellers
6. Continuation of the tribes current Acquisition Program as a supplement to the project

The Tribal Government is responsible for supplying the \_\_\_\_\_ Agency with a Tribal Land Acquisition Plan / Land Consolidation Plan / Economic Development Plan to assist the Agency in determining the long-range goals and future direction of the tribal government, and a priority listing of allotted tracts that if purchased, would be used for economic development, housing etc.

Also a commitment by the Tribal Government of the (Name of Tribe/Band) and that when majority interest in an allotment has been acquired through the project, for the Band, the Tribe/Band will consider the use of Section 2004 of the Act to acquire the remaining undivided interests in that tract.

This cooperative agreement will remain in effect until the completion of the project and is subject to modification upon the concurrence of all the parties.

This signatory to this cooperative agreement understands that this is an expansion of the original pilot project and certain procedural processes will be addressed as the program proceeds. This Agreement is entered into this \_\_\_\_\_ day (month) of 2004.

\_\_\_\_\_  
Name of Chairman/Tribal President  
*Name of Band or Tribal Council*

\_\_\_\_\_  
Robert R. Jaeger  
*Director – Indian Land Consolidation Office*

\*Sample provided by the Bureau of Indian Affairs

**APPENDIX 2**

NAME OF TRIBE OR BAND  
RESOLUTION NO.

**WHEREAS, The [NAME OF TRIBE/BAND]** is a federally recognized Indian Tribe organized pursuant to the Indian Reorganization Act of 1934 and all pertinent amendments thereof; and

**WHEREAS, The [NAME OF TRIBE/BAND]** is governed by a **TRIBAL COUNCIL/BUSINESS COMMITTEE** made up of representatives who act in accordance with the powers granted to it by its constitution and By-Laws and

**WHEREAS, The [NAME OF AGENCY]** has been selected to participate in the Indian Land Consolidation Program because the **[NAME OF TRIBE/BAND]** has a high number of fractionated allotted lands and

**WHEREAS, The Bureau of Indian Affairs** will administer the Indian Land Consolidation Program with the funds allocated to purchase fractionated heirship interests in land from individuals that will reduce the fractionation problem and at the same time reduce the administrative costs associated in maintaining IIM accounts and eliminating future probates, and

**WHEREAS, The [NAME OF TRIBE/BAND]** has reviewed this request and recommends approval of the Indian Land Consolidation Program in accordance with the constitution and By-Laws of the **[NAME OF TRIBE/BAND]**; and

**THEREFORE BE IT RESOLVED,**

that the **[NAME OF TRIBE/BAND]** hereby consents to aggressively pursue this opportunity to increase the **[NAME OF TRIBE/BAND'S]** land base.

**BE IT FURTHER RESOLVED,**

that the **[NAME OF TRIBE/BAND]** fully support the Indian Land Consolidation Program that is designed to reduce the fractionation problem which will also reduce the administrative costs associated to maintain IIM accounts, eliminating future probates and increase the **[NAME OF TRIBE/BAND'S]** land base.

**BE IT FURTHER RESOLVED,**

that the Tribal **CHAIRMAN/PRESIDENT** or Vice are authorized to enter into a written agreement with the Bureau of Indian Affairs, U.S. Department of the Interior, to formalize participation in the Indian Land Consolidation Program.

**CERTIFICATION**

\*Sample provided by the Bureau of Indian Affairs



## ABOUT THE AUTHORS

**Robert DesJarlait**, *Red Lake Ojibwe-Anishinabe*, is a cultural educator, artist and writer. In 2003, DesJarlait was the recipient of St. Paul Companies LIN (Leadership in Neighborhoods) Grant. He is the St. Paul Representative for the Minnesota Indian Affairs Council and he belongs to the University of Minnesota Council of Elders. His articles have been published in The Circle newspaper and in several Native American journals. He currently has two non-fiction works in progress – *A History of Indian Child Welfare* and *A History of the Southern Arapaho*.

**Marcie R. Rendon**, *White Earth Anishinabe*, is a mother, grandmother, and writer. Rendon was a 1998/99 recipient of the St. Paul Company's LIN (Leadership In Neighborhoods) Award to create a viable Native presence in the Twin Cities Theatre community. Six of her plays were produced in the last eight years, as well as numerous one-acts, collaborations and Raving Native productions. Her second non-fiction children's book, "*Farmer's Market: Families Working Together*" was published by CarolRhoda, Inc. in 2001.

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### DISCLAIMER

While the Indian Land Tenure Foundation provided financial support for the research and publication of this paper, the views expressed are solely those of the authors and do not necessarily reflect the views of the Indian Land Tenure Foundation.

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Comments on this working paper are welcome and should be forwarded in writing to:

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