TRANSFER OF INDIAN LANDS TO HEIRS OR LINEAL DESCENDANTS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2223

TO PERMIT ANY INDIAN TO TRANSFER BY WILL RESTRICTED LANDS OF SUCH INDIAN TO HIS OR HER HEIRS OR LINEAL DESCENDANTS

FEBRUARY 28, 1980

WASHINGTON, D.C.

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TRANSFER OF INDIAN LANDS TO HEIRS OR LINEAL DESCENDANTS

THURSDAY, FEBRUARY 28, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 12:25 p.m., in room 457, Russell Senate Office Building, Senator John Melcher (chairman) presiding.

Present: Senators DeConcini and Hatfield.

Staff present: Max Richtman, staff director; Jo Jo Hunt, staff attorney; Virginia Boylan, staff counsel; Peter Taylor, special counsel; and John Mulkey of Senator DeConcini's staff.

Senator MELCHER. The committee will be in order.

We are sorry for the delay, but there was a series of votes on the Senate floor. It started a few minutes past 10 o'clock and it ended just now. It kept all the committee members present on the floor.

We will start the hearing on S. 2223 and we will interrupt it when a quorum of the members appears so that we can mark up some bills. We will finish the hearing immediately after that.

The hearing this afternoon is on S. 2223, a bill to permit any Indian to transfer, by will, restricted lands of such Indian to his or her heirs or lineal descendants. Section two of this bill would amend section 4 of the Indian Reorganization Act of 1934 to allow an Indian owner of restricted property to will such property to his own lineal descendants even though State law may not define such lineal descendant as an "heir at law." A problem in the administration of section 4 of the Indian Reorganization Act has recently arisen in the State of Arizona and elsewhere due to changes in the State law governing descent and distribution.

The second section of S. 2223 would amend section 4 of the Indian Reorganization Act to authorize Indian tribes to adopt their own code of laws to govern inheritance and descent and distribution of trust property situated within the tribes' reservation boundaries. In past years, tribes have petitioned Congress to enact specific laws to govern inheritance within their reservations. This section would provide a general authorization to the tribes to adopt their own code of laws, subject to the approval of the Secretary of the Interior.

At this time I will place a copy of S. 2223 in the record along with a letter received from Alan Parker of the Justice Department.

[The bill and letter follow:]

96TH CONGRESS
2D SESSION

S. 2223

To permit any Indian to transfer by will restricted lands of such Indian to his or her heirs or lineal descendants.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1980

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To permit any Indian to transfer by will restricted lands of such Indian to his or her heirs or lineal descendants.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds and declares that—

(1) as a result of the enactment by certain States of amendments to their intestate succession laws, members of Indian tribes within such States are restricted in their right to devise restricted Indian lands to their own children who are not classified as heirs at law under such amended intestate succession laws; and

(2) it is the policy of Congress to allow any Indian to devise restricted Indian lands and shares in the assets of any Indian tribe or corporation to his or her heirs or lineal descendants.

SEC. 2. Section 4 of the Act of June 18, 1934, as amended (25 U.S.C. 464), is amended (1) by inserting in the first proviso clause immediately after the words "corporation or any heirs" the following: "or any lineal descendants", (2) by designating the existing text thereof as subsection (a), and (3) by adding at the end thereof the following new subsection:

"(b) Any tribe which is recognized by the United States as having powers of self-government may adopt their own code of laws to govern the inheritance or descent and distribution of trust or restricted property within the reservation boundaries of such tribe: *Provided,* That such code of laws shall have no force or effect until it has first been approved by the Secretary of the Interior. Such code of laws shall supersede any conflicting provision in subsection (a) of this section.".

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

21 FEB 1980
REC'D FEB 2 - 1980

Honorable John Melcher
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Melcher:

This is in response to your invitation to the Department of Justice to testify on S. 2223, a bill "To permit any Indian to transfer by will restricted lands of such Indian to his or her heirs or lineal descendants."

The area of Indian probate law is entirely within the jurisdiction of the Department of Interior. Therefore, we defer to Interior on S. 2223 and submit this letter in lieu of appearing before the Committee on this bill.

Thank you for your letter.

Sincerely,

Alan A. Parker
Assistant Attorney General

Senator MELCHER. We will now hear from our first witness. He is Hans Walker, Acting Associate Solicitor, Division of Indian Affairs, Department of the Interior.

STATEMENT OF HANS WALKER, JR., ACTING ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS, OFFICE OF THE SOLICITOR, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY VERNON J. RAUSCH, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, TWIN CITIES, MINN.

Mr. WALKER. Mr. Chairman, thank you for the opportunity to appear before the committee to testify regarding S. 2223, a bill to permit any Indian to transfer by will trust or restricted lands of such Indian to his or her heirs or lineal descendants.

I have with me Mr. Vernon Rausch, who is an inheritance examiner in Minneapolis. He will be available later to answer some of the questions you might have.

I regret that time has not permitted the formulation of an official position by the Department of the Interior with respect to this legislation. We therefore urge the committee to defer action on this legislation until such time as we can provide you with our formal views and recommendations on the bill.

Now, however, I would like to raise for the committee's consideration a number of substantive concerns that have been identified during our preliminary review of the bill. As explained below, a number of significant policy and legal questions have been raised which should be thoroughly addressed before proceeding with this legislation. Accordingly, the Department does not support the enactment of S. 2223 in its present form.

The bill has two discrete purposes. The first is to amend a portion of section 4 of the Indian Reorganization Act—25 U.S.C. 464—which prohibits Indians from devising restricted Indian lands subject to the act by will to anyone other than: No. 1, the tribe having jurisdiction over the lands; No. 2, any member of such tribe, regardless of whether they are related to the Indian testator; or, No. 3, any heir of the Indian testator.

The second purpose of the bill is to amend Federal law to authorize Indian tribes to enact tribal laws governing the inheritance of Indian trust property, provided such tribal inheritance laws are approved by the Secretary of the Interior.

First, I would like to discuss briefly the legal background regarding the inheritance of Indian trust property. Indian tribes currently have the legal authority to govern the inheritance of property within their jurisdiction, except to the extent that such power has been limited by Federal laws.

Under section 5 of the General Allotment Act of 1887—25 U.S.C. 348—trust-allotted lands descend upon the allottee's death to "his heirs according to the laws of the State or territory where such land is located." But even though State laws govern the order of intestate succession to Indian trust property, a 1910 statute—25 U.S.C. 372—makes the Secretary of the Interior, rather than State courts, responsible for determining the heirs of deceased Indians with respect to such property. Another provision of the same statute authorizes

Indians to make wills devising their trust property, provided the will is approved by the Secretary—25 U.S.C. 373. Again, however, the Department's Office of Hearings and Appeals, rather than State probate courts, is responsible for the probate of wills of Indian testators disposing of trust or restricted property.

An exception is that Oklahoma State courts do have jurisdiction over the descent and distribution of Indian trust estates of members of the Osage and Five Civilized Tribes in that State by virtue of special Federal statutes relating to the trust property of members of those tribes.

State laws governing the execution of wills and devise of property by will generally do not apply to the devise of Indian trust property. One instance in which State inheritance laws do impact on the devise of Indian trust property under a will, however, is under the provisions of section 4 of the Indian Reorganization Act. As noted above, the effect of section 4 of the Indian Reorganization Act is to limit the power of an Indian testator to devise trust lands subject to the act to anyone other than: No. 1, the tribe having jurisdiction over the lands; No. 2, any member of such tribe; or, No. 3, any of the heirs of the testator.

Under these provisions, the heirs of such Indians are determined as of the time of the decedent's death by reference to the laws of the State in which the lands are located.

Section 2(1) of S. 2223 would amend section 4 of the Indian Reorganization Act to allow Indian testators to devise Indian trust lands to any of their lineal descendants in addition to any of their heirs at law, regardless of whether such descendants are members of the tribe having jurisdiction over the land. As originally enacted, section 4 of the Indian Reorganization Act restricted the sale, gift, exchange, or other transfer, as well as the devise, of Indian trust lands subject to the act.

The purpose of this restriction was to limit the alienation of Indian lands to non-Indians and to reduce fractionation of ownership in such Indian lands. In 1948, however, Congress enacted legislation, set out in 25 U.S.C. 483, removing the prohibitions against the sale or transfer of Indian trust lands under section 4 of the Indian Reorganization Act and authorizing the Secretary of the Interior to approve conveyances of Indian lands held under the Indian Reorganization Act upon application of the Indian owners.

This provision, however, has never been interpreted to remove the Indian Reorganization Act restrictions on the devise of trust land, and therefore section 4 of the Indian Reorganization Act still operates as a limitation on the class of persons to whom an Indian testator may devise his or her trust lands.

It should be noted that the restrictions on inheritance under section 4 of the Indian Reorganization Act apply only with respect to Indian trust lands under the jurisdiction of Indian tribes which did not vote to reject the provisions of the Indian Reorganization Act—25 U.S.C. 478—and do not apply to Indian homesteads and public domain allotments or lands on reservations which were excluded from the operation of the act, under the provisions set out in 25 U.S.C. 468 and 473.

It should also be emphasized that the restriction under section 4 of the Indian Reorganization Act on devising trust lands to someone

other than a legal heir of the testator applies only when the named devisee is not a member of the tribe. Nonetheless, limitations on the class of heirs under State law combined with the fact that a testator's relatives may not be tribal members have resulted in numerous instances in which an Indian testator has been unable to will his or her trust property to parents, brothers or sisters, grandchildren, or even children, because those persons were not the decedent's legal heirs.

In such instances the attempted devise under the will is invalid and the property passes to the heirs under the laws of intestacy, often resulting in greater fractionation of ownership in the land.

A persuasive argument can be made that the restriction on devise of trust land under section 4 of the Indian Reorganization Act has outlived its usefulness and has operated in such an inequitable manner, in some cases at least, that removal of this prohibition would be justified. One alternative would be to completely repeal this limitation and allow Indian lands subject to the Indian Reorganization Act to be devised to anyone, subject to secretarial approval of the will under 25 U.S.C. 373, the same as other Indian trust or restricted lands. While such a proposal would allow alienation of Indian lands to non-Indians in the discretion of the Indian testator, there is a real question whether repeal of this provision would significantly diminish the Indian land base.

The language of S. 2223 is considerably narrower and would relax the limitation under section 4 of the Indian Reorganization Act only to the extent that nonmember, nonheir, lineal descendants could be named as devisees. The question is whether the bill goes far enough to adequately address the problems arising under this section, since the arguments in favor of allowing Indians to leave trust lands to their children or grandchildren despite the restrictions of section 4 apply with equal force to allowing the devise of trust lands to parents, brothers, sisters, or other relatives of the testator even when they do not qualify as heirs under State law or do not come within the class of eligible devisees by being members of the tribe.

The second part of S. 2223 raises additional problems. Under section 2 (2) and (3) of the bill, Indian tribes would be authorized to enact their own laws governing the inheritance or descent and distribution of Indian trust property, subject to the approval of the Secretary of the Interior; such laws would supersede applicable Federal and State laws to the extent of any inconsistency.

As noted previously, but for the existence of Federal statutes providing for holding legal title to Indian land by the United States and for governing the inheritance of that trust property, Indian tribes would have the legal authority to determine the manner in which that property within their jurisdiction could be inherited. The question of whether such Federal laws should be amended to allow tribes to exercise legal authority with respect to the inheritance of trust property is essentially a question of policy, but also involves legal questions concerning the responsibility, and potential liability, of the United States as trustee of allotted Indian lands.

The issues here are: first, the scope of authority which would be given to tribes under the legislation and, second, what limitations should be imposed upon the exercise of such authority. It is unclear under the bill whether tribes would be allowed to enact laws governing the order of intestate succession only, or would be authorized to make

laws governing the execution of wills and/or to undertake the actual probate and administration of Indian trust estates as well. Applying tribal inheritance laws to determine the heirs of deceased Indians in departmental proceedings would be a less radical departure from existing law. There are, however, very real problems that would nonetheless arise even under this more limited authorization.

The underlying concern here is with the possibility that tribal law might impermissibly discriminate among different classes of relatives as heirs, result in a charge or encumbrance against trust property, or interfere with private property rights by unduly limiting the inheritance of trust property.

The United States is under a legal obligation to hold trust allotted lands for the benefit of the original allottee and his or her heirs, free from all charge or encumbrance during the trust period. Although Congress might legally revise the laws determining exactly what persons are the heirs of an allottee, the clear intent of the allotment act was to vest private property rights of the allottee during his or her lifetime and in the allottee's heirs or devisees after the allottee's death.

It is clear that the Federal trust responsibility does not terminate with the death of the original allottee and extends to Indian heirs and devisees as the Indian owners of trust lands. In our opinion, adoption and approval of a tribal law which essentially precluded inheritance of trust lands would amount to nothing less than sanctioned termination of the trust responsibility.

Even when tribal inheritance laws might not be so extreme, there are potential problems. After the Supreme Court's decision in *Santa Clara Pueblo* v. *Martinez,* any challenge with respect to violations of the Indian Civil Rights Act under a tribal inheritance law would be limited to proceedings in tribal court without the opportunity for Federal judicial or administrative review.

In addition, no criteria for guiding the Secretary's exercise of approval authority are provided in the bill. While the requirement of secretarial approval of tribal inheritance laws would undoubtedly serve as a check against potential abuse, a balance must be struck between preservation of the Federal trust responsibility, the rights of individual Indians, and the governmental authority of Indian tribes.

Parenthetically, any amendment such as that in section 2 of S. 2223 should take the form of an amendment to the Act of June 25, 1910—25 U.S.C. 372, 373—rather than to section 4 of the Indian Reorganization Act, since the latter statute applies only to tribes which did not vote to reject the application of the Indian Reorganization Act. Any distinction between the governmental authority of Indian Reorganization Act tribes and non-Indian Reorganization Act tribes in the context of this bill would be completely meaningless.

In conclusion, the Department has not yet taken an official position with respect to S. 2223. There are, however, a number of unanswered questions and potential legal problems regarding the bill which, in my opinion, would have to be satisfactorily resolved before the Department could support enactment of legislation along the lines of S. 2223. That concludes my statement. I would be happy to answer any questions.

Senator MELCHER. Mr. Walker, did the Department testify on H.R. 2102? That is the Standing Rock Sioux Reservation bill.

Mr. WALKER. I am not aware of that, Mr. Chairman.

Senator MELCHER. That bill is on the floor now. It concerns the laws of descent pertaining to trust lands of that reservation. It would seem to me that if the Department took note of that bill, which was introduced February 13, 1979, and has gone through the committee process over there in the House, that the Department would be close to being in shape to advising us on how they feel about S. 2223, which attempts to solve the same problem that H.R. 2102 attempts to solve for just one reservation.

The difference is that the Senate bill would attempt to solve the problem for all Indian tribes. The House bill only seeks to solve the Standing Rock situation.

I would hope that we can get a more concise, clear, definitive position on the problem within the next couple of weeks. Would that be possible?

Mr. WALKER. I do not know whether that will be possible or not, Mr. Chairman. We would have to——

Senator MELCHER. It is obvious from your testimony that you agree there is a huge problem. It would seem to me at some point that this trust status of Indian lands could be sorted out to make some common sense. I think it is rather odd to deny to a citizen of the United States the right to name their own heirs.

Mr. WALKER. That is true. The Department has already sanctioned that latitude to Indians in other situations. We have little problem with the first part of the act with respect to that activity. It is the second part which we raise questions on.

Senator MELCHER. Let us have the department's position as rapidly as possible.[1]

Mr. WALKER. Yes, sir.

Senator MELCHER. Mr. Walker, does your associate have anything to add?

Mr. WALKER. No; we have nothing further to add.

Senator MELCHER. The committee may have some questions that we will submit to you in writing and hope they could be answered along with the Department's position and recommendation.

Mr. WALKER. Very good.

Senator MELCHER. Thank you very much.

Our next witness on S. 2223 is Reid Chambers.

STATEMENT OF REID PEYTON CHAMBERS, ESQ., WASHINGTON, D.C.

Mr. CHAMBERS. Mr. Chairman, my name is Reid Chambers. I am an attorney in private practice representing a number of Indian tribes including the Assiniboine and Sioux Tribes of the Fort Peck Reservation in your State; the Standing Rock Sioux Tribe, which the chairman referred to earlier, which has proposed a separate inheritance bill; and the Shoshone Indian Tribe in Wyoming.

I will submit my prepared statement for the record and try to summarize it here briefly.

Essentially, Mr. Chairman, my clients support generally the bill which is S. 2223.

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[1] Material not received at time of printing.

Other witnesses from Arizona are going to comment on the first part of the bill, dealing with the problem of the limitation of only heirs being able to inherit trust land.

It would seem to me, I might say parenthetically, that the problem could be solved if you change heirs to Indians so then anyone who is an Indian recognized by the Secretary of the Interior could inherit trust land on any reservation. The problem the Indian Reorganization Act was designed to solve was the problem of land going out of trust. As long as an Indian inherits the land, that would be protected.

The issue I would like to speak to, which deals with the Standing Rock bill, is the second part of the bill. It does authorize Indian tribes to exercise authority to govern the passage of land inheritance or by devise on their reservations. That is an extremely desirable feature of the bill for every Indian tribe of the country. I am surprised that the Interior Department has problems with it.

The essential concept has been, in a great deal of legislation passed by Congress, that Congress delegates increasing authority to control matters on reservations by Indian tribes: liquor back in 1953; Federal contracts and programs in the Self-Determination Act; and childwelfare placements. All of this kinds of delegation is in keeping with the self-determination policy. It has also been sustained by the Supreme Court.

It is an important, desirable feature. It would help tribes control the increasing fractionation of allotted lands on their reservations. I certainly hope the committee will consider favorably and pass this bill.

I do have a couple of amendments which I would like to suggest to the committee.

The problem that gave rise to the Standing Rock heirship bill is specifically a problem where you have an Indian allottee married to a non-Indian. The Indian dies first. They have Indian children. Now, under the State law of most States, the non-Indian spouse would inherit all or half of that allotment. Then it goes into fee status. By the time the spouse dies, the children are not able to inherit it in trust status. You get increasing fractionation. You may have the spouse go out and remarry a non-Indian, have non-Indian children. You have an increasing fractionation of land on the reservations and increasing passing of Indian trust land out of trust.

I would submit that the bill should provide—the DeConcini bill, S. 2223—should provide for a tribe to limit the non-Indian spouse to a life estate, not an estate of inheritance, so that the land may be preserved in trust during that period for the Indian heirs.

I have proposed also in my testimony——

Senator MELCHER. I am going to interrupt you.

Do you think that is a reasonable request?

Mr. CHAMBERS. I do, Senator, or I would not make it.

Senator MELCHER. Why do you think it is reasonable?

Mr. CHAMBERS. I think it is reasonable because it is now in keeping with the law of a great deal of States dealing with non-Indian property—say the dower interest—that a surviving spouse gets a life estate in the property but that the property goes on down to the children or whoever the Indian testator wills it to but that it stays in trust.

The problem you get, Senator, for example, on the Standing Rock Reservation, about 10 percent of the allotments at Standing Rock

now have some of the interest held in fee and some held in trust. Every time someone dies, you get five or six new owners. So you get, over time, a great deal of increase in your——

Senator MELCHER. I am not speaking to that point. I am speaking to the point where you deny a husband the right to will his property to his wife.

Mr. CHAMBERS. Well, you could do it two ways. You could have it apply only when the property goes intestate, Senator.

Let me try to summarize the testimony this way. The Senate and Congress have had to pass, in recent years particularly, a number of bills dealing with heirship land problems and inheritance on particular reservations: Yakima, Osage. Some of them go back into the 1920's: Warm Springs, Umatilla.

This year we have proposed a bill which has been introduced in the House and reported favorably by the House Interior Committee to deal with the inheritance problems of Standing Rock.

All of these bills are different because each one deals with a particular problem on an individual reservation. Of course, it is taxing for the tribes and it is taxing on the Congress to have to consider bills for each individual tribe. So, I do heartily commend to the committee the idea of delegating this power to individual Indian tribes to pass their own ordinances. That is what the second section of the bill, S. 2223, would do.

That is essentially why I think most Indian tribes in the country would support it.

We do have a couple of other technical amendments which are outlined in my testimony, and which I can consult with the committee staff on further, if the committee is of a mind to consider them.

Senator MELCHER. Thank you very much.

Mr. CHAMBERS. Thank you, Senator.

Senator MELCHER. Without objection, we will make your written statement a part of the record.

[The statement follows:]

PREPARED STATEMENT OF REID PEYTON CHAMBERS, ESQ.

Mr. Chairman and members of the Committee, my name is Reid Chambers and I am a partner in the law firm of Sonosky, Chambers & Sachse with offices at 2030 M Street, N.W., Washington, D.C. 20036. On behalf of our tribal clients including the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, the Shoshone Indian Tribe of the Wind River Indian Reservation, Wyoming, and the Standing Rock Sioux Tribe of North and South Dakota I appear today generally to support S. 2223, a bill to permit any Indian to transfer by will restricted lands to his or her heirs or lineal descendants.

Other witnesses will speak to the precise problem giving rise to Section 2(a) of this bill, which is that Section 4 of the Indian Reorganization Act (25 U.S.C. 464) means that an Indian cannot will his lands to his children or other lineal descendants if they are not his "heirs". I will focus my attention on Section 2(b), which authorizes Indian tribes to adopt laws governing "the inheritance or descent and distribution of trust or restricted property within the reservation boundaries of * * * [the] tribe."

The concept of the bill is in line with many other acts of Congress delegating power to Indian tribes to control activities on their own reservations. For example, in 1953 Congress provided that Indian tribes could control the sale of liquor on their reservations. Act of August 15, 1953, 18 U.S.C. 1161. In the landmark Indian Self-Determination Act of 1975, Congress delegated broad powers to Indian tribes to administer federal contracts and programs on their reservations. Most recently, in the Indian Child Welfare Act of 1978, Congress provided that tribes could promulgate standards governing the placement of tribal members in

foster homes even in state court proceedings outside their reservations. Legislation is required for Section 2(b) to become effective since, without legislation, tribes could not control the passage of lands beneficially owned by Indians where the fee is held by the United States. The Supreme Court has sustained the validity of these delegations of governmental power to Indian tribes in *United States* v. *Mazurie*, 419 U.S. 544 (1975).

Enabling individual tribes to enact laws governing inheritance and descent and distribution of trust property within their reservation will give them the means to control one of the most serious problems in Indian country today—what is usually referred to as "the fractionated heirship" problem. On most Indian reservations, tribal lands were divided into allotments to individual tribal members in the early part of this century. As original allottees died, the lands passed by will or by intestate succession to their heirs, as determined under state law. In a number of respects, the laws of the states favor broad distribution of property. The result in the context of Indian allotments is that as allottees die, ownership of these small tracts of reservation land becomes increasingly dispersed. A single allotment of 160 acres may have so many heirs that the common denominator is expressed in millionths with hundreds of owners. On the Standing Rock Sioux Reservation in North and South Dakota, for example, one-sixth of all trust allotments have 20 or more owners and nearly half the allotments have over 10 owners. The largest number of owners of a single allotment is 397! The problem becomes progressively worse as any owner dies. Land in fractionated ownership cannot be effectively used, and a great deal of effort is required, for example, to secure a lease of the land, to grant a right-of-way over it, or to distribute any moneys earned from a productive use of it.

If individual tribes were empowered to pass their own laws controlling inheritance and descent and distribution of trust and restricted property as S. 2223 proposes, they could limit the number of people who will inherit allotments and thus reduce the problem of fractionation. Until now, tribes have had to come to Congress for individual bills dealing with the problem. Congress has passed a number of such bills since 1925, including the Act of February 27, 1925, c. 359, § 7, 43 Stat. 1011 (as amended by the Act of September 1, 1950, c. 832, 64 Stat. 572)—(Osage Reservation of Oklahoma); the "old Yakima law"—the Act of August 9, 1946, c. 933, § 7, 60 Stat. 969 (superseded by the Act of December 31, 1970, P.L. 91–627, 84 Stat. 1874)—(Yakima Reservation of Wyoming); the "new Yakima law"—the Act of December 31, 1970, P.L. 91–627, 84 Stat. 1874, 25 U.S.C. 607)—(Yakima Reservation of Washington); the Act of August 10, 1972, P.L. 92–377, 86 Stat. 530—(Warm Springs Reservation of Oregon); the Act of September 29, 1972, P.L. 92–433, 86 Stat. 744—(Nez Perce Reservation of Idaho); and the Act of April 18, 1978, P.L. 95–264, 92 Stat. 202—(Umatilla Reservation of Oregon).

Yet these laws vary greatly because of particularized differences and needs on these reservations. On behalf of the Standing Rock Sioux Tribe, which we represent, we have sought to secure passage of a bill pertaining to inheritance of trust or restricted land on that reservation through the pass of two Congresses. S. 3398 was introduced by Senators Abourezk and Burdick in the 95th Congress, but time did not permit its passage. In this present Congress, an identical bill was introduced by Representative Andrews of North Dakota and Representative Abdnor of South Dakota (H.R. 2102 and H.R. 2674). This bill has been favorably reported by the House Committee on the Interior and Insular Affairs, and we hope for adoption of the legislation this year. This bill would accomplish what could essentially be accomplished by Section 2(b) of S. 2223 which is to provide a uniform set of standards fixing who could inherit trust property on the Standing Rock Reservation. It is, of course, an unnecessary burden both to tribes and to Congress to have to consider these bills on individualized basis and S. 2223 could remove this burden.

One problem faced at Standing Rock and on other reservations would not be dealt with by S. 2223 as presently drafted. This involves the removal of land from trust status when a non-Indian spouse is the "heir". To illustrate this common problem, an Indian dies leaving a non-Indian spouse and Indian children. Under the laws of most states, where no will has been left, a spouse takes half the property and the children take the other half. But since the spouse is a non-Indian, his or her half must be taken under existing law in fee status. The non-Indian spouse dies and the children inherit the remaining half, it is out of trust and cannot readily be taken back into trust. Or the surviving non-Indian spouse remarries, this time to a non-Indian and there are non-Indian children of the second marriage. When the non-Indian spouse dies the land title is further complicated by the trust

and fee mixture. The Government is confronted with administrative problems arising from the limitations on its power over fee land and conflicts between the trust responsibility and the demands of the non-Indian owners of fractional interests in the land. Frequently the Indian fractional owners cannot get anything out of the land because one non-Indian with a fractional interest will be in possession.

We submit that the Indian children should be able to inherit the entire interest of an Indian parent in trust lands without having the lands go into fee status for the surviving non-Indian spouse. We recommend that S. 2223 be amended to provide that a tribal law may limit surviving non-Indian spouses to a life interest in trust or restricted property without having the property pass out of trust status.

We also proposed three other amendments for the Committee's consideration.

First, the bill or the committee report should provide that tribes with existing legislation—such as the Osage, Yakima and others—can supersede that legislation under this bill just like other tribes.

Second, we propose deleting the requirement in Section 2(b) that a tribal law be approved by the Secretary of the Interior. Some tribal constitutions, particularly constitutions adopted under the Indian Reorganization Act, require Secretarial approval for all such laws. Other tribal constitutions do not, and some tribes do not have constitutions at all. We think that the existing procedure for Secretarial approval should be whatever is provided in the constitution. Conformity to federal law would be preserved, since federal law is supreme and would be followed in any court proceedings.

Third, we think the Committee should consider providing specifically that tribal laws should be enforced by the administrative law judges of the Interior Department when probating trust and restricted property. Consideration might be given, in addition, to authorizing tribes to empower Interior Department administrative law judges to probate all property of Indian decedents, including non-trust property, whenever they probate Indian estates. If a tribe opted to do this, the substantive probate law would be promulgated by the tribe, but the enforcement mechanism would be by federal administrative procedures if the tribe wishes, rather than in tribal courts. A tribe might decide that federal administrative law judges have more expertise dealing with probate matters, and that its tribal courts should deal with other criminal and civil litigation rather than developing that expertise. Of course, we would emphasize that any change in the bill along this line should be left to the choice of individual tribes.

Thank you for the opportunity to appear before you and to testify on this important legislation. I would be happy to answer any questions the Committee may have.

Senator Melcher. Our next witness is Alexander Lewis of the Gila River Indian community.

STATEMENT OF ALEXANDER LEWIS, GOVERNOR, GILA RIVER INDIAN COMMUNITY; ACCOMPANIED BY ROD LEWIS, ATTORNEY

Governor ALEXANDER LEWIS. Mr. Chairman and members of the committee, I am Alexander Lewis, governor of the Gila River Indian community. To my right is the attorney for the Gila River Indian community, Rodney B. Lewis. On my left is a member of the tribal council.

I am happy to be here today to express our support of S. 2223, a bill intended to permit any Indian to transfer by will restricted lands of such Indian to his or her heirs or lineal descendants.

This bill, if enacted, will permit: No. 1, Pimas and Maricopas to freely devise allotted land to their children or grandchildren who are not members of the tribe where the land is located; No. 2, encourage the drafting of wills to prevent further fractionalization of our land base; and No. 3, afford the Gila River Indian community an opportunity to draft a probate code which is consistent with our traditions and customs. Therefore, we strongly support S. 2223 and urge prompt approval of this bill.

I thank you for providing me this opportunity to speak today and for your due consideration of this bill. At this time I will let our attorney further explain the bill.

Mr. ROD LEWIS. Mr. Chairman and members of the committee, we view S. 2223 as corrective legislation. The problem apparently stems from an unfortunate interpretation by the Department of the Interior of section 4 of the Indian Reorganization Act codified at 25 U.S.C. 464, which requires that allotted land shall descend or be devised in accordance with State Law and it must descend or be devised to a member of the tribe and, finally, to heirs of such member.

The problem in Arizona is that in 1974 Arizona adopted a version of the Uniform Probate Code. This is now law in the Arizona Revised Statute, section 14–2102. This section determined that in an intestate situation the separate property and the community property of the decedent would pass to the surviving spouse if the children are the issue of the decedent and the surviving spouse. The problem therefore arises that, if the children were not members of the tribe, they would not be considered heirs at law as far as the Department of the Interior is concerned. If they are not members of the tribe, not heirs at law, the will would be invalidated.

At this time this is a fairly common situation. In talking with the administrative law judge handling the Phoenix area, at least three wills have been formally invalidated. I myself represented a client whose will was invalidated because of this particular interpretation.

Even more so, I think the status of the law provides a chilling effect to anybody who wishes to devise land to children who are not members of the tribe where the land is located.

The chilling effect is this. People go to the Department of the Interior, Bureau of Indian Affairs, and ask for assistance in making out a will, which is a common procedure. They are simply informed that they are not able to devise land to a child, a grandchild, or other lineal descendant who is not a member of the tribe where the land is located.

The reason we do not have an enormous number of wills being invalidated is probably because at the beginning they are simply advised that they cannot make out a will in this manner and do not even attempt to try.

The effect of the present situation is to frustrate Indians who want to devise land or give land to their children. It has a particular discriminating effect on children or grandchildren who, for one reason or another, are not members of the tribe where the land is located.

I might add that it is difficult to find information in this area. But it is apparently the formal position of the Department of the Interior that this is the way that this section is to be interpreted.

I would refer this committee to the Solicitor's opinion in 54 Interior Decisions 584, which was drafted and approved in 1934. There are a series of other cases or decisions from the Board of Indian Appeals since that time.

Directing your attention to section 2 of this bill, we also support the development of probate codes which would govern descent and distribution of restricted or trust property. We think it is a fine opportunity for tribes to incorporate traditional customs and traditions which could be recognized in these codes.

Senator MELCHER. In your view, does the addition of "lineal descent" of section 4 of the Indian Reorganization Act go far enough to solve your problem in Gila River? That is the first part of the question. I take it from what Mr. Lewis has said that perhaps that does not go far enough.

Mr. LEWIS. Mr. Chairman, we would, if we had a choice, certainly prefer, I believe, stronger language. The language suggested by Reid Chambers earlier certainly would be something which I think the community council of the Gila River Indian Community would support. That is that only members of the tribe would be able to inherit this land.

Senator MELCHER. It would have to be relatives?

Mr. LEWIS. Yes.

Senator MELCHER. Even if they were not lineal descendants?

Mr. LEWIS. Well, that——

Senator MELCHER. Did you say yes? Did you say yes, that it had to be relatives?

Mr. LEWIS. No, what I am saying is that it would be our position that, if a person were a member of the tribe, he certainly could devise land. That would remove some of the restrictions.

Senator MELCHER. Regardless of any relationship?

Mr. LEWIS. Yes.

Senator MELCHER. What if he were not a member of the tribe, just an Indian?

Mr. LEWIS. Well, the reason that we would prefer members of the tribe is, we want to preserve the land base. It has got to be kept within Indian hands. Certainly, that would require, I would assume, compensation for the person who would ordinarily get land but be unable to hold it.

Senator MELCHER. Would not this second section permit you to do that, where the tribes enact their own laws?

Mr. LEWIS. Yes; it would. That would be very helpful. If we could determine intestate succession, that certainly would go a long way toward solving this problem.

Senator MELCHER. Thank you all very much.

Governor LEWIS. Thank you.

Senator MELCHER. Next we will hear from Herschel Andrews, president of the Salt River Tribe. He is accompanied by Dick Wilks.

STATEMENT OF HERSCHEL ANDREWS, PRESIDENT, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY; ACCOMPANIED BY DICK WILKS

Mr. ANDREWS. Thank you, Mr. Chairman. My name is Herschel Andrews. I am president of the Salt River Pima-Maricopa Indian community.

I want to thank the committee for giving me the opportunity to testify on behalf of S. 2223. This legislation will confirm, in Indian tribes, the power to adopt laws to govern inheritance or descent and distribution of trust or restricted property within reservation boundaries.

Let me give an example of the situation that we are facing in Salt River, and this directly affects my family—my mother's side of the

family. My grandparents are both deceased. My grandmother originally was from Gila River and was enrolled in the Gila River Indian community. My grandfather was enrolled in the Salt River Indian community. The problem that has come up now is that the children in that part of my mother's family are all members of the Salt River Pima-Maricopa Indian community. They can inherit all the land that my grandfather had. The land that my grandmother had, the landholdings that she had in Gila River, my mother and brother and her sisters and brothers cannot inherit that land in the Gila River Indian community.

This is not the only situation that we have. We have other members of the community that currently are in the same situation.

At the present, the administrative law judge has held off any probate hearings regarding any person that is deceased and was at that time enrolled in the Gila River Indian community in hopes that some type of legislation would come about so that, eventually, when it does occur and legislation is passed, in my family's situation, that they are able to inherit land within the Gila River Indian community.

The Salt River Pima-Maricopa Indian community fully supports S. 2223 at this time.

If you have any questions, I will be glad to answer any questions you may have.

Senator MELCHER. Mr. Wilks, do you have anything to add?

Mr. WILKS. I do not, Mr. Chairman.

Senator MELCHER. You were present, I believe, Mr. Andrews, when we were asking this question about expanding the language dealing with the Indian Reorganization Act. How do you respond to the same question: In your view, does the addition of "lineal descendants" to section 4 of the Indian Reorganization Act go far enough to solve your problems?

Mr. ANDREWS. I do not think we would have any objection to that. I think the primary interest that we would have in terms of the legislation that is now being discussed is the second portion of it—giving the tribes authority to adopt ordinances.

Senator MELCHER. That will give you some flexibility in handling it within the tribe—to make the proper adjustments.

Mr. ANDREWS. Yes.

Senator MELCHER. The part about holding in trust, holding the land on the reservation in Indian ownership, within the tribe itself—would you want it to be a member of the tribe?

Mr. ANDREWS. When I talked about the situation that exists, I think as long as that person or whoever it may be—as long as that individual is Indian that is inheriting the land holdings—when we talk about land holdings in which I heard two other people discuss non-Indians holding land in Indian communities. I think it is a process of education. In the Salt River Indian community we have been very much interested and very much concerned in terms of non-Indians holding land within the Salt River community.

We make it a practice to educate our people, our members of the community, in terms of marrying non-Indians. What has been happening in terms of that particular situation is that when wills are made out, especially dealing with non-Indians, those wills reflect

that those individuals would only have a live estate in the wills that are made out.

Senator MELCHER. Is the membership of the Pima-Maricopa Indian community on the roll?

Mr. ANDREWS. Yes. Are you talking about enrollment?

Senator MELCHER. Yes.

Mr. ANDREWS. Originally we had roughly around 2,600 people that were enrolled. We are now up to about 3,400 members that are enrolled in the Salt River Indian community.

One situation that exists within the Salt River Indian community is that when the Pimas and Maricopas first settled in what is now the Salt River Indian community, most of those people originally were from Gila River. So, we have both people that are still enrolled in Gila River but are living in the Salt River Indian community.

Senator MELCHER. Is the enrollment determined by blood quantum?

Mr. ANDREWS. Yes.

Senator MELCHER. Thank you very much.

Mr. ANDREWS. Thank you.

Senator MELCHER. That concludes our hearing on S. 2223. The committee will stand adjourned.

[Whereupon, at 1:12 p.m., the hearing was adjourned.]

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