TESTIMONY OF

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U.S. DEPARTMENT OF THE INTERIOR

ON

S. 1340, THE "INDIAN PROBATE REFORM ACT OF 2001"

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

U.S. SENATE

MAY 22, 2002

Good Morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to appear before you today to present the views of the Administration on S. 1340, a bill to amend the Indian Land Consolidation Act of 2000 to provide for probate reform with respect to trust or restricted lands. We support the bill.

In particular, I want to commend your staff for their efforts in developing this legislation. S. 1340 will provide the American Indian people who own trust and restricted assets with one uniform probate intestate code that can be applied throughout Indian country. The legislation is clearly the product of a lot of hard work by Departmental employees and members of your staff in order to achieve the common goal of reforming the Department's Indian probate program.

During tribal consultations held in July and August 2000 on the proposed probate regulations, many

Tribes recommended and supported a uniform probate intestate code. At the present time, federal statutes provide that the law of the state where the land is located be applied in the distribution of the estate. See 25 U.S.C. §348. As a result of inter-tribal marriage, it is not uncommon that an Indian decendent owns lands on reservations in several states. The effect of applying up to 33 different state laws to the restricted and trust lands of a decedent results in disparate and unfair treatment of the distribution of the entire estate to the same heirs.

For example, in Nebraska a surviving spouse is entitled to receive the first $50,000 of the estate. Thereafter, the law provides that the surviving spouse receive ½ and children get ½ of the remainder of the estate. Minnesota law provides that a surviving spouse's share is the first $150,000 plus ½ of the balance of the intestate estate if all of the heirs are also heirs of the surviving spouse. In contrast, Wisconsin law provides that a surviving spouse receive 100 percent of the estate unless one or more children are not the children of the surviving spouse, then the surviving spouse receives only ½. New Mexico law differs from the previous examples in that a surviving spouse gets all the community property, then 1/4 of the estate if there are descendants of the decedent.

Another area of concern is the inheritance rights of adopted children and the inconsistencies in state laws. Minnesota law provides that an adopted child may inherit from his/her natural parents, while Montana law provides that an adopted child may only inherit from the adopted parents.

The enactment of a uniform intestate code for trust and restricted estates is of great benefit to both the heirs and the Department. The benefit to the heirs is that the same law will be applied to **all** the

trust and restricted estate of the decedent no matter where the real property is located. A uniform intestate probate code will provide for the division of shares of the entire estate and will be the same throughout the United States. The heirs may disclaim their interests or otherwise agree to a settlement to distribute the estate if the children want to give a larger share to their surviving parent. The federal government's cost to update and maintain land records will be reduced. The Department will be able to decide cases and issue orders in a more timely manner. A new body of federal law will be created and decisions will be more consistent across the Nation, resulting in fewer appeals. The necessity of thoroughly researching state laws will no longer exist, it will take less time to issue an order determining heirs. Finally, a uniform intestate code may encourage Indian tribes to adopt their own inheritance codes. The uniform intestate code will serve as a model for Tribes to develop their own tribal probate codes.

The proposed uniform intestate succession facilitates the consolidation of interests to remain in trust or restricted status and complements the provisions of Indian Land Consolidation Act to minimize further fractionation of Individual Indian interests in trust and restricted lands. For estate planning purposes, one uniform intestate code will provide a foundation to encourage the execution of wills for disposition of trust or restricted assets. For example, the proposed section for pretermitted spouses and children will necessitate specific estate planning if the decedent marries after the execution of a will but intends to leave nothing to the new spouse. S.1340 at §232 (d). Similarly, if the testator divorces after executing a will and has left property to the former spouse, the devise is revoked by law unless the will provides otherwise. S. 1340 at § 232(e)(2).

State probate laws are often amended and likewise affect long term estate planning. A change in state law may also necessitate the execution of a new will. Thus, frequent amendments of state laws frustrate the purposes of promoting estate planning among Indian landowners. There will obviously need to be considerable community education on the new sections of the proposed uniform intestate law that will require more comprehensive estate planning.

We recommend that Senate Bill 1340 include a provision that excepts the application of the uniform intestate code to the Five Civilized Tribes of Oklahoma until such time as the Five Nations bill is enacted. The Five Civilized Tribes are subject to the state district courts of Oklahoma and Oklahoma probate law is applied to determine intestate succession. Thus, the removal of the exception should be reflected in S. 2880, the Five Nations legislation.

We would like to suggest amendments to portions of existing federal statutes relevant to inheritance prior to the passage of S. 1340. The amendments are:

25 U.S.C. § 348 - After the second " *Provided,* " strike the words, "That the law of descent in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except by the" and insert "the Indian Land Consolidation Act, as amended, shall apply where such trust or restricted assets are located". See S. 1340 at § 234 (c).

25 U.S.C. § 372 - Insert before the word "hearing" in the words "upon notice and hearing", the words "opportunity for a". Insert the words "probate the decedent's trust estate, and pay valid creditor's claims out of funds in such estate or funds that may accrue up to the date of death of the decedent" after the word "decedent,". Insert "*Provided,* That in the payment of claims, 31 U.S.C.

§ 3713(a)(1)(b) shall not apply." after "section 373 of this title."

25 U.S.C. §373 - Insert "*Provided also*, that the Secretary shall pay valid creditor's claims out of funds in such estate or funds that may accrue up to the date of death of the decedent except that 31 U.S.C. § 3713(a)(1)(b) shall not apply:" after the words "or use it for their benefit:"

With that Mr. Chairman, I would just like to say thank you, again, for the hard work of your staff in drafting this much needed piece of legislation. I would be happy to answer any questions you may have for me.