

House Subcommittee on Indian, Insular, and Alaska Native Affairs

Don Young, Chairman

Hearing Memo

April 8, 2015

To: Natural Resources Committee Members

From: Majority Staff, Subcommittee on Indian, Insular, and Alaska Native Affairs

Hearing: Legislative hearing on H.R. 812 (Simpson-ID), the *Indian Trust Asset Reform Act*

When/Where: Tuesday, April 14, 2015, at 11:00 A.M. in Room 1334 Longworth HOB

Summary of the Bill

H.R. 812, the *Indian Trust Asset Reform Act* was introduced by Rep. Mike Simpson on February 9, 2015 and has been referred to the Subcommittee on Indian, Insular, and Alaska Native Affairs. The bill authorizes a demonstration project for tribes to negotiate on a voluntary basis with the Secretary of the Interior (“Secretary”) to manage their trust assets in accordance with relevant federal treaties, statutes, and court decisions. The bill also authorizes, at Secretary’s option, to create a new position of Under Secretary for Indian Affairs in the Department of the Interior.

Cosponsors

Rep. Tom Cole (R-OK-4)
Rep. Denny Heck (D-WA-10)
Rep. Derek Kilmer (D-WA-6)

Background

The term “federal trust responsibility to Indians” is frequently referenced to characterize the federal government’s obligation to carry out terms of treaties and statutes in a just manner for the benefit of Indians. There is, however, no general statutory definition of “trust responsibility.”

The term developed from early 19th century Supreme Court decisions holding that recognized Indian tribes are “domestic dependent nations” over which Congress exercises exclusive and plenary power. Accordingly, tribes’ lands and affairs were managed by the United States (first by the War Department and then by the Interior Department) “under a highly paternalistic system where the presumptively knowledgeable Secretary protects incompetent wards.”¹ The result of this historic system of comprehensive federal supervision over tribal affairs is exceptionally high rates of poverty, joblessness, health problems, and suicide.

¹ Statement of David A. Mullon, Chief Counsel, NCAI, Prepared Statement on H.R. 409, the *Indian Trust Asset Reform Act*, before the Sub. Cmte. On Indian and Alaska Native Affairs, May 2014.

The modern era of promoting tribal self-determination was launched by President Richard M. Nixon. In his Special Message to Congress on Indian Affairs, President Nixon argued, “It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people.” He would later add, “In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.”²

Congress subsequently enacted the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638), which authorizes tribes to deliver federal services and benefits to their members under negotiated contracts, compacts, or annual funding agreements with the government. In addition to authorizing these “638 contracts,” Congress in consultation with tribes has enacted a number of laws designed to increase the opportunity for tribes to assume greater degrees of administration over their assets.

While tribes over the last 40 years have increased their capacity to administer federal funds and services, their lands continue to be held in trust by the Secretary, an arrangement that is often a hindrance to Indian prosperity. Some statutes require the Secretary of the Interior to perform comprehensive control over an Indian asset in a manner that exposes taxpayers to enormous liabilities when (not “if”) the Secretary mismanages it. In these cases, the Secretary’s primary concern is risk avoidance, which may benefit the taxpayer but not the tribe. Other statutes authorize the Secretary to perform merely basic administrative duties for Indians with no enforceable fiduciary standards. Accordingly, an Indian trust asset could be underutilized or even mismanaged with no meaningful remedy available to the beneficial owner of that asset.

Seeking to increase control over their assets, tribal leaders developed ideas that were first introduced in the 109th Congress as H.R. 4322 (Rep. Pomo/ Rep. Rahall) and S. 1439 (Sen. McCain/ Sen. Dorgan), bills titled the “Indian Trust Reform Act of 2005.” These bills proposed to legislatively settle the then-ongoing *Cobell v. Norton* individual Indian money accounting lawsuit, create an Indian trust reform commission, authorize a demonstration project for tribes to manage trust assets, establish an Under Secretary for Indian Affairs within the Interior Department while abolishing the Office of the Special Trustee for American Indians.

H.R. 4322 and S. 1439 did not pass because the *Cobell* Plaintiffs rejected an offer of \$7 billion to settle their claims through the bills. The Plaintiffs would go on to negotiate with the Obama Administration a settlement of just \$3.4 billion.³

The provisions of these bills to authorize tribes to manage their trust assets and to create an Under Secretary have however, been introduced as part of H.R. 812.

Need for Legislation:

As mentioned previously, H.R. 812 would allow tribes to have more control over their trust assets. In many instances tribes have continuously showed they are simply able to do a better job managing their assets. A product of more control for tribes is increased revenue from trust resources and eventually job creation. This scenario has been plagued by silo management of tribal resources within the federal government. H.R. 812 would restructure the role the federal government has with managing tribal trust resources.

² Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76.

³ Interior press release on the announcement of the settlement agreement:
<http://www.bia.gov/cs/groups/public/documents/text/idc002743.pdf>

Since the establishment of OST, management of Indian trust assets in DOI has been contained in two separate bureaucratic silos within DOI. Even though their work often overlaps, OST employees do not have authority over BIA employees, and vice versa.

Analysis of H.R. 812

H.R. 812 is divided into three Titles. Title I sets forth congressional findings and a reaffirmation of policy concerning the United States' trust responsibilities to Indians. Title II authorizes a demonstration project in which a tribe is authorized to negotiate to assume management and control of its trust assets under a plan approved by the Secretary of the Interior. Title III elevates the status of Indian Affairs responsibilities by authorizing the Secretary of the Interior the option to create a new Under Secretary for Indian Affairs, who would work directly with the Special Trustee for American Indians to ensure an orderly transition of OST functions.

Section-by-Section:

Title I—Recognition of Trust Responsibilities

Sec. 101. Congressional Statement of Findings. Sets forth congressional findings regarding the United States' fiduciary responsibilities to Indians and Indian tribes.

Sec. 102. Congressional Reaffirmation of Policy. Reaffirms that the United States' responsibilities to Indian tribes include, and are not limited by, a duty to promote tribal self-determination regarding governmental authority and economic development.

TITLE II—Indian Trust Asset Management Demonstration Project Act

Sec. 201. Short Title. Provides that this title may be cited as the "Indian Trust Asset Management Demonstration Project Act of 2015."

Sec. 202. Definitions. Provides definitions for this title.

Sec. 203. Establishment of demonstration project; selection of participating Indian tribes. Directs the Secretary of the Interior ("Secretary") to establish and carry out an Indian trust asset management demonstration project. Provides that Indian tribes desiring to participate in the project must submit, and the Secretary approve, a written application. The demonstration project will remain in effect for ten (10) years after enactment but may be extended at the discretion of the Secretary.

Sec. 204. Indian trust asset management plan. Provides that an Indian tribe shall, after receiving notice from the Secretary that it is eligible to participate in the demonstration project, submit to the Secretary a proposed Indian trust asset management plan and addresses various criteria. The Secretary may not approve a proposed plan unless it is consistent with federal treaties, statutes, executive orders, or court decisions applicable to the trust assets or the management of the trust assets. After an Indian tribe submits a proposed plan, the Secretary shall approve or disapprove it within 120 days.

Section 204(c) allows the Secretary to approve plans that include or incorporate by reference tribal surface leasing or forest management regulations that, if approved by the Secretary as part of a trust asset management plan, would allow tribes to conduct activities under those tribal regulations without obtaining Secretarial approval. Most of this subsection is adopted verbatim from the Helping Expedite and Advance Responsible Tribal Home Ownership of 2012 (Public Law 112-151).

Sec. 205. Effect of Title. Provides that nothing in this title or in a trust asset management plan shall affect the liability of the United States or an Indian tribe participating in the project. Provides that nothing in this title shall affect application of any treaty, statute, executive order, or court order applicable to the trust assets or the management of the trust assets subject to the plan. Provides that nothing in this title diminishes or affects the trust responsibility of the United States to Indian tribes or individual Indians.

Title III—Restructuring The Office Of Special Trustee

Sec. 301. Purpose. States that the purpose of this title is to ensure a more effective and accountable administration of the duties of the Secretary with respect to providing services and programs to Indians and Indian tribes.

Sec. 302. Definitions. Provides definitions for this title.

Sec. 303. Under Secretary for Indian Affairs. Authorizes the Secretary, at the Secretary's discretion, to establish the position of Under Secretary for Indian Affairs ("Under Secretary"), which would report directly to the Secretary. In addition to other enumerated duties, the Under Secretary would coordinate policies of the Bureau of Indian Affairs with the policies of other bureaus and offices within the Department.

Sec. 304. Office of Special Trustee for American Indians. Section 304(a) directs the Secretary to prepare a report within one year of enactment that, among other things, includes a transition plan for the Office of the Special Trustee ("OST") to terminate within two years of the date of the report. Directs the Secretary to consult with Indian tribes and tribal organizations on the report and submit the final report to Congressional authorizing and appropriations committees. The Act does not require the Secretary to implement or execute the transition plan. Section 304(b) authorizes Indian tribes or a consortium of Indian tribes to include certain OST employees known as fiduciary trust officers in contracts, compacts, or cooperative agreements under the Indian Self-Determination and Education Assistance Act (P.L. 93-638) as amended.

Sec. 305. Appraisals and Valuations. Section 305(a) requires the Secretary, within 18 months of enactment and in consultation with Indian tribes, to ensure that appraisals and valuations of Indian trust property are administered by a single bureau, agency or other administrative entity within the Department. Sections 305(b) and (c) establish a process whereby the Secretary establishes minimum qualifications for persons to prepare appraisals and valuations of Indian trust property. When an Indian tribe or Indian beneficiary submits an appraisal or valuation to the Secretary that satisfies those minimum qualifications—and the submission acknowledges the tribe or beneficiary's intent to have the appraisal or valuation considered under this new subsection—the appraisal or valuation will not require any further Secretarial review or approval and will be considered final for purposes of effectuating the applicable transaction.

Sec. 306. Cost Savings Recommendations. Provides that for any function or activity that OST will not have to operate or carry out as a result of any transfer of functions or personnel under this title, the Secretary shall identify any resulting cost savings and provide this information to the Tribal/Interior Budget Council ("TBIC") within 60 days, or other appropriate advisory committee. Within 90 days of receiving this information, the tribal representatives of the TBIC or other advisory committee may provide recommendations on how any cost savings should be reallocated, incorporated into future budget requests, or appropriated.

Support for the Legislation:

The bill is supported by the National Congress of American Indians ("NCAI"), the Confederated Tribes of the Colville Reservation, and the Affiliated Tribes of Northwest Indians (which includes 57 tribal governments in Oregon, Idaho, Washington, southeast Alaska, northern California and Montana).

Witnesses

Mr. Ernest Stensgar, Chair, Trust Reform Committee, Affiliated Tribes of Northwest Indians Vice Chairman, Coeur d'Alene Tribe, Plummer, ID.

Mr. William Nicholson II, Secretary, Colville Business Council, Confederated Tribes of the Colville Reservation,

The Honorable Vincent Logan, Special Trustee, Office of the Special Trustee for American Indians, Department of Interior, Washington, D.C.

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