

Committee on Natural Resources
Rob Bishop, Chairman
Markup Memorandum

January 29, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff
Subcommittee on Indian, Insular and Alaska Native Affairs (x6-9725)

Markup: Markup on H.R. 812 (Rep. Michael Simpson, R-ID), To provide for Indian trust asset management reform, and for other purposes.
February 2-3, 2016 1324 Longworth HOB

H.R. 812 (Rep. Michael Simpson, R-ID), “Indian Trust Asset Management Demonstration Project Act of 2015”

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 tribal trust assets in accordance with relevant federal treaties, statutes, and court decisions. The bill also authorizes, at the Secretary’s option, the creation of a new position of Under Secretary for Indian Affairs in the Department of the Interior.

Cosponsors

Rep. Tom Cole (R-OK), Rep. Denny Heck (D-WA), Rep. Paul Gosar (R-AZ), Rep. Walter Jones (R-NC), Rep. Raul Labrador (R-ID), Rep. Cathy McMorris Rodgers (R-WA), Rep. David Reichert (R-WA), Rep. Dan Newhouse (R-WA) Rep. Suzan DelBene (D-WA), Rep. Derek Kilmer (D-WA), Rep. Mark Pocan (D-WI).

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 record of this historic system of comprehensive federal supervision over tribal affairs is one of exceptionally high rates of poverty, joblessness, health problems, and suicide across large segments of Indian Country. As a former Assistant Secretary for Indian Affairs has stated:

With these ideas as the foundation of the trust, it grew into a stifling, paternalistic, and ultimately ineffective system of managing Indian property. While virtually all other areas of federal Indian policy have undergone dramatic change, with a radical shifting of authority from the Bureau of Indian Affairs to tribal governments, the trust remains largely ineffective, unenforceable, and immune from fundamental change.²

The modern era of promoting tribal self-determination was launched by President Richard M. Nixon. In his Special Message on Indian Affairs (July 8, 1970), 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.”

Congress subsequently enacted the Indian Self-Determination and Education Assistance Act (“ISDEAA”)³, 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 if the Secretary mismanages trust assets. 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.

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.

² Kevin Gover, “An Indian Trust for the Twenty-First Century,” *Natural Resources Journal*, Spring 2006, 46 Nat. Resources J. 317, p. 1.

³ 25 U.S.C. 450 et seq.

Need for Legislation:

Because the current paradigm of the trust responsibility as conceived and implemented by the government has, in the view of at least one prominent Indian critic, “wreak[ed] all manner of harm on tribal communities,”⁴ H.R. 812 sets forth a process by which a tribe may opt to assume direct control over its trust assets, providing the United States taxpayer is not held financially liable by any party for losses incurred as a result. 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 Analysis:

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. The Secretary may not approve a proposed plan unless it is consistent with federal treaties, statutes, executive orders, or court

⁴ GOVER, *supra*, at 1.

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).

Cost:

The committee has not received an official CBO score for H.R. 812; however, it has produced a score for the Senate companion, S. 383 (Crapo), and determined the bill have no significant effect on the budget.⁵

Anticipated Amendment:

An amendment in the natural of a substitute will be offered which makes several changes in response to comments received by the Department of the Interior as well as tribal stakeholders. A summary of the changes found in the amendment are as follows.

Section 101—Findings: In response to input received from DOI to the House Natural Resources Committee staff and from a tribal organization, the findings were revised for accuracy and to reflect more modern terminology.

Section 202—Definitions: The definition of “Indian tribe” was revised to reflect the definition in the Indian Self Determination and Education Assistance Act (“ISDEAA”).

Section 204—Indian Trust Asset Management Plan: Section 204(a)(2)(D)(i) is revised to provide for additional clarity for functions that tribes plan to perform under the ISDEAA in proposed trust asset management plans. In response to concerns about the scope of “standards” that would need to be considered in evaluating proposed management plans, Section 204(c) is revised to omit that language. References to “court decisions” throughout Title II were omitted

⁵ <https://www.cbo.gov/publication/51175>

because of a concern for variations in caselaw between circuits that would delay and complicate review and approval of proposed trust asset management plans.

Section 205—Forest Land Management and Surface Leasing Activities: Subsection (e) from Section 204, which authorizes the Secretary to approve Indian trust asset management plans with HEARTH Act provisions for either surface leases or forest management activities, is reorganized into its own Section 205 for ease of reading. Section 205(g) adds forest land management activities to the HEARTH Act waiver of federal liability, correcting an inadvertent omission from the bill as introduced.

Section 206—Effect of Title: Section 206(c) is revised to respond to concerns raised about future federal liability should an Indian tribe direct that a resource be managed at a lesser standard in a trust asset management plan. Section 206(d) clarifies that title II does not preclude Indian tribes from performing activities in a trust asset management plan under the ISDEAA. Section 206(e) clarifies that an Indian tribe may submit tribal regulations that provide for HEARTH Act⁶ treatment for forest management activities for review and approval without submitting them as part of a trust asset management plan.

Title III: The title of Title III is revised to more accurately reflect the various subsections therein. Section 304 is revised to provide additional specificity for the report to Congress. Based on input received from a tribe and a tribal organization, a new Section 304(c) is added to clarify that the transition plan and report required by Section 304 does not, by itself, cause the termination of OST. Additional revisions are made to sections 301, 305, and 306 for clarity and consistency.

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⁶ See P.L. 112-151.