TESTIMONY OF
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U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON
H. R. 3532, AMERICAN INDIAN EMPOWERMENT ACT

FEBRUARY 7, 2012

Good afternoon, Mr. Chairman and Members of the Subcommittee. My name is Del Laverdure, and I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am pleased to be here today to present the Department's views on H.R. 3532, the American Indian Empowerment Act. While the Department supports the concept of tribes having greater control over their lands, including innovations regarding the use of restricted fee lands, we have concerns with H. R. 3532 as currently drafted.

The Bureau of Indian Affairs (BIA) provides services directly or through contracts, grants, or compacts to a service population of about 1.7 million American Indians and Alaska Natives who are enrolled members of 566 federally recognized tribes living on or near Indian reservations in the 48 contiguous United States and Alaska. In addition, the BIA is responsible for the administration and management of approximately 56 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. Building strong, prosperous, Native American economies is a priority for this Administration. The Administration continues to strongly support tribal self-determination and self-governance and we recognize that tribal control over tribal lands and resources is intrinsic to this policy.

I want to first commend the efforts by tribal leaders and the Subcommittee in seeking an innovative approach to enhancing tribal control over tribal resources in the interest of economic development. It is a goal we share and we welcome this opportunity to engage in what we hope will be an ongoing dialogue about how best to accomplish the aims embodied in the proposal we are here to discuss today.

If enacted, H.R. 3532 would require the Secretary of the Interior to transfer land held in trust for a federally recognized Indian tribe to such tribe as restricted fee tribal land upon the tribe's request. The land would be subject to a restriction against alienation and taxation. Under the proposed bill, this would allow Indian tribes to lease or grant an easement or right-of-way on restricted fee tribal land for any period of time without review and approval by the Secretary. The bill also designates such lands as "Indian country," and "preempts" the operation of Federal laws and regulations with tribal law governing the use of such lands.

We are willing to work with tribes and with the Subcommittee to develop a mechanism for enhanced autonomy over tribal lands for those tribes seeking that option. We are concerned that as currently drafted, this bill is too imprecise a tool for accomplishing its stated aim and as a result has the potential to create confusion. There are critical ambiguities that must be addressed, and we raise these issues in an effort to contribute to a productive dialogue on this important goal.

First, section 2(a) of the bill would require the Secretary, upon request of an Indian tribe, to convey to the tribe in restricted fee status, specified land currently held by the United States in trust for the tribe. Any restricted fee land held by a tribe would be "Indian country" as defined in 18 U.S.C. § 1151, and subject to the restrictions of the Non-Intercourse Act, 25 U.S.C. § 177.

We are concerned that this provision may result in confusion for tribes, the Department and the other stakeholders. For example, the proposed statutory language should be clarified as to whether this authority applies only to land in which the tribe is the sole beneficial owner, or whether it extends to land in which the tribe owns only a fractional interest.

Once land is converted from trust to restricted fee, the bill should also clarify whether there would be a mechanism to convert the land back into trust status if the tribe so desires, or whether this process is irreversible.

It is important to note that many trust administration federal statutes, as well as case law, treat trust and restricted land the same, *see*, *e.g.*, 25 U.S.C. §§ 3703, 3715 (leasing of Indian agricultural lands); 25 U.S.C. § 323 (rights-of-way); 25 U.S.C. § 81 (contracts and agreements with Indian tribes that encumber Indian lands). It is not clear what effect, if any, this provision would have on those statutes or on the case law. Section 2(c) provides that once the land is transferred to restricted fee status, a tribe may lease the land, or grant an easement or right-of-way across it, without review and approval by the Secretary, notwithstanding the provisions of the Indian Long-term Leasing Act, 25 U.S.C. § 415.

We have several concerns, however, regarding this provision in H.R. 3532. First, it is unclear whether the provision would apply to restricted fee land held by tribes acquired outside the proposed trust-to-fee conversion process. We are concerned that this provision may result in confusion regarding the scope of the Section 415 exemption. Section 415, the Indian Long Term Leasing Act, does not authorize encumbrances such as rights-of-way or easements. Moreover, other statutes authorize leasing, for example the American Indian Agricultural Resources Management Act, the Native American Housing and Self-Determination Act, the Indian Mineral Leasing Act, and the Indian Mineral Development Act. There are also tribe-specific statutes such as the Navajo-Hopi Rehabilitation Act, affecting leasing and encumbrances, 25 U.S.C. § 635, on tribal land. The bill does not address these additional statutory authorities.

We recommend the bill explicitly state the extent of the intended exemption on restricted fee land from all applicable statutes. Without such language, the Secretary may still need to review each lease to ensure that approval is not needed under authority other than 25 U.S.C. § 415.

Additionally, since all of the leasing (and other encumbrance) statutes are delegations of Congressional authority to approve alienation of Indian land, and there is no authority to convey title to tribal land, Congress should clarify how this provision to remove restrictions on alienation should be read in conjunction with the previous provision imposing restrictions on alienation under 25 U.S.C. § 177.

Section 2(d) of the bill further provides that tribal law establishing "a system of land tenure" governing the use of its restricted land shall preempt any provision of federal law or regulation governing "the use of such lands." However, these terms are not defined. Congress should specify the scope of the tribal law that can preempt federal law and the scope of the federal and state laws to be preempted. "A system of land tenure" should also be defined, including any restrictions on its scope, and spell out the imposition of any related duties on the Secretary.

Section 2(e) of the bill provides that it does not diminish the trust responsibility of the United States. This provision raises a number of important questions. Since the trust duties of the United States are conferred and defined in part by federal statutes and regulations, the provisions allowing for preemption of those statutes and regulations may, in fact, diminish those duties and undermine the Secretary's ability to carry out aspects of the trust responsibility as currently embodied in those statutes and regulations.

We are in the process of revising leasing regulations as part of the effort to return control of land use decisions to tribal management and to streamline surface leasing processes to promote economic development, clean energy and homeownership. The proposed regulations make explicit that trust and restricted lands are not subject to state or local taxation and apply both to lands held in trust and lands held in restricted fee. The comment period on those proposed regulations has just ended, and we anticipate issuing final regulations later this year.

For several of the issues we raise today, we propose that H.R. 205, the Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH Act), may provide a model. The HEARTH Act would restore tribal authority to govern leasing on tribal lands and to promulgate regulations for the governance of those leases, while preserving the statutory tools available to the Secretary for carrying out the trust responsibility to tribes. This model ensures that tribal regulations provide a mechanism for environmental review and public comment, exempting the Secretary for liability from claims by parties to the lease, and authorizing the Secretary to cancel a lease that is not in accordance with approved tribal regulations.

For example, we recommend that clarifications be incorporated similar to the clarifications of the trust responsibility in the HEARTH Act currently being considered by the House and the Senate. As currently written, the bill does not clearly specify, for example, what trust duties remain or what enforcement authority or liability may remain with the Secretary with respect to leases exempt from Secretarial approval and entered pursuant to tribal regulations over which the Secretary has no authority. There is currently no provision in this bill requiring tribes to notify the Secretary of executed leases, so the Secretary is not in a position to know that a lease exists, much less that a trespass is occurring or when a lease is being violated.

It is our hope that we can work together to address the issues we have identified today to reach a consensus proposal for empowering tribes through enhanced autonomy over tribal lands and resources. Such measures not only empower tribes, but will ultimately reduce the costs of implementing tribal leasing programs for the federal government by allowing willing tribal governments to assume control of leasing on tribal lands.

Thank you for the opportunity to present testimony on H. R. 3532. I will be happy to respond to any questions you may have.