

STATEMENT FOR THE RECORD – UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SUBCOMMITTEE ON INDIAN, INSULAR, AND ALASKA NATIVE AFFAIRS
HOUSE OF REPRESENTATIVES
ON
H.R. 329, INDIAN EMPLOYMENT, TRAINING AND
RELATED SERVICES CONSOLIDATION ACT OF 2015
APRIL 14, 2015

Chairman Young, Ranking Member Ruiz and Members of the Subcommittee, thank you for the opportunity to submit this statement for the record from the Department of the Interior (Department) on H.R. 329, a bill to “amend the Indian Employment, Training and related Services Demonstration Act of 1992 to facilitate the ability of Indian tribes to integrate the employment, training, and related services from diverse Federal sources, and for other purposes.”

The Department has testified on similar legislation, most recently in April 2014 before the Senate Committee on Indian Affairs, and we appreciate that this legislation addresses many of the concerns the Department has expressed on past versions of this legislation. We also appreciate your commitment, Mr. Chairman, to sustaining and improving the Public Law 102-477 program (477 Program). The 477 Program has operated over the past 22 years as a demonstration project, and what the 477 Program has demonstrated is that when agencies collaborate to surmount bureaucratic obstacles, including by consolidating programs, and when they deliver badly-needed services on a one-stop basis, they can more promptly and efficiently remediate joblessness and social distress in Native communities. In sum, the demonstration has been successful.

Public Law 102-477 is a self-determination statute that allows tribes greater control over delivery of social welfare and workforce development services. It permits eligible federally-recognized tribes and Alaska Native organizations to consolidate into a single plan employment- and training-related, formula-funded federal grant monies from eleven different programs within our Department’s Bureau of Indian Affairs and Bureau of Indian Education; the U.S. Department of Labor (DOL); and the U.S. Department of Health and Human Services (DHHS), such as the Native Employment Works Program (NEW), Tribal Temporary Assistance to Needy Families Program (TANF), and Child Care and Development Fund Program (CCDF). The 477 Program allows participating tribes to save administrative time and expense because they are no longer required to submit individual program plans and reports. This reduces bureaucracy and insures that more resources go to job placement and other services.

Public Law 102-477 designated the Department to be the lead agency to administer this program. The Department is proud, that in FY 2014, \$90 million was disbursed to 477 Program tribal participants in the form of grants under the 477 Program. The Department generally supports H.R. 329 and would like to work with Chairman Young and the Subcommittee on a few provisions to improve the delivery of services to Public Law 102-477 grantees.

H.R. 329 establishes a dispute resolution mechanism to address agency denials of requests for waivers of “applicable statutory, regulatory, or administrative requirements, or of Federal agency policies or procedures necessary to enable the Indian tribe to efficiently implement” a Public

Law 102-477 plan. These provisions give the agency from whom a waiver is sought 90 days to grant or deny the waiver and another 30 days to provide the affected tribe and our Department written notice of the denial and the reasons for the denial. If the agency from whom a waiver is sought fails to act within the bill's timelines, the waiver is deemed to be granted. The provisions also authorize our Department to review the denial on specified grounds and then, within 30 days, set up an interagency dispute resolution process including as participants our Department, the tribe seeking the waiver, and the agency from whom the waiver is sought. If this process fails to resolve the dispute, the head of the affected agency is accorded the final authority to resolve it.

We generally support the aim of this provision. These waivers can give tribes the flexibility needed to address urgent problems. We suggest some changes to make the provision more workable. First, 90 days may not be a sufficient amount of time for proper deliberation and collaboration among our federal partners to decide the merits of a tribal waiver request under H.R. 329. This bill appears to offer a workable approach to addressing waiver disputes, particularly since it reserves to the affected agency the ultimate decision with respect to whether a waiver is granted. Second, we suggest that the Waiver Authority under H.R. 329 be clarified. It currently indicates that "the head of each affected Federal agency *shall* waive any applicable statutory, regulatory, or administrative requirement, regulation, policy, or procedure promulgated by the agency that has been identified by the parties," under subsection (b). While the waiver provisions in Sec. 8 of H.R. 329 identify review and discretion for the request for a waiver, the language identified in subsection (d) mandates the waiver of "any applicable statutory, regulatory, or administrative requirement, regulation, policy, or procedure promulgated by the agency that has been identified by the parties." The Department recommends changing "shall" to "may," to authorize discretion in the review and deliberation of requests for waivers under Sec. 8 of H.R. 329.

Third, the deemed approved provisions place the Department in the position of substituting our discretion for that of other Federal agencies. While our Department welcomes further streamlining of the plan approval process, the Department cannot support giving the Department control over other federal agencies' disposition of funds. What has made the Public Law 102-477 program successful is that it requires cooperation between agencies. This provision undermines that spirit of cooperation by allowing one Department to override the authority and legitimate concerns of co-equal Federal partners.

Finally, while we appreciate the bill's specification of the Department's role as lead agency under the 477 Program, we must oppose the provision contained in Section 11 that would require the Department to distribute funds to tribal grantees "not later than 45 days after the date of receipt of the funds from the appropriate Federal department or agency." As a practical matter, there are steps that must be completed by tribes before the Department can distribute funds from other agencies.

The Department cannot disburse these funds until we obtain a signed grant amendment from the grantee's tribal chairman. This exchange can take time and is often dependent upon the tribal chairman's availability. Also, almost fifty percent of the 477 Program grantees operate under self-governance Annual Funding Agreements, which creates an additional step in the process of

disbursing program funds since the BIA is required to prepare a Funding Document to transfer these funds to the Department's Office of Self-Governance.

It is important that the Department and our federal partners coordinate closely on the multi-step transfer processes that occur before funds are received by our agency. Further, it is important to quickly disburse program funds because the Department knows that, in many instances, such funds are life sustaining. Section 13 of H.R. 329 would require 477 Program federal partners to transfer funds to the Department "not later than 30 days after the date of apportionment." The Department would like to discuss this section with the affected federal partners and whether this requirement would unreasonably burden them if H.R. 329 were enacted into law.

With respect to the bill's requirement that the Department establish a memorandum of understanding with other Federal agencies to set up an annual meeting of 477 Program tribal participants and federal partners and develop a single report format, we must point out that this kind of collegial and deliberative process is already occurring under authority of the Administrative Flexibility Working Group (AFWG) and the Department believes it is not necessary to require this of Federal agencies. The AFWG has met extensively and, among other achievements, has streamlined the 477 Program plan approval process and developed new reporting forms.

**TESTIMONY
OF
VINCENT G. LOGAN
SPECIAL TRUSTEE FOR AMERICAN INDIANS
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS
ON H.R. 812, THE INDIAN TRUST ASSET REFORM ACT**

April 14, 2015

Good afternoon, Chairman Young, Ranking Member Ruiz, and Members of the Subcommittee. My name is Vincent Logan and I am the Special Trustee for American Indians. I am pleased to appear before the Subcommittee today to discuss H.R. 812, the *Indian Trust Asset Reform Act*. We appreciate that this Subcommittee continues to advance legislation that addresses the challenges faced by the Department of the Interior in managing the Indian trust, and we support the efforts of Congress to clarify Indian trust management duties, responsibilities and expectations.

The provisions in H.R. 812 are similar to language in trust reform legislation from previous Congresses. As discussed in more detail below, it is the Department's view that considerable changes to the language of H.R. 812 would be necessary for it to materially improve Indian trust management. For this reason, we must oppose the bill as introduced. However, we look forward to continued discussion of this issue.

Background

Since the passage of the *American Indian Trust Fund Management Reform Act of 1994 (1994 Reform Act)*, the Department has made great strides in trust reform. The Office of the Special Trustee for American Indians (OST) was created by Congress in 1994. Prior to this, there was no organization in the Department solely dedicated to applying a uniform fiduciary standard to the Department's responsibility for tribal and individual trust assets. Today, beneficiaries have direct access to staff that are trained in fiduciary trust matters, and best-practice procedures are in place for the management of account information and the collection and distribution of trust funds. All these reforms have been implemented to provide the best service to tribal and individual Indian beneficiaries.

The past two decades have demonstrated the wisdom of Congress in taking this action, because effective reforms have been implemented, including the hiring of much needed fiduciary trust officers and regional trust administrators across the nation. We have also seen the integration of technology to streamline and standardize all title, accounting, and asset management; a records-management program now considered one of the best in the nation; and, a Fiduciary Trust Model now implemented throughout Indian country.

Perhaps the best measure of OST's success is a milestone that was first achieved two years ago: for FY 2013 the Department received an unmodified opinion -- a clean audit -- for the Individual Indian Money (IIM) Trust fund financial statements. By way of comparison, when the first full financial statement audit was conducted in 1996, auditors identified 60 deficiencies, of which seven were material weaknesses. This is equivalent to a grade of D – just short of complete failure. After two decades of steady reform led by OST, KPMG essentially gave the Department an A+ rating for the first time since that initial audit was prepared.

OST continued that record of success by earning another clean audit for FY 2014. During the time period from the first audit to the latest, the Tribal and IIM trust balances increased from \$2.7 billion to \$4.9 billion and the number of beneficiary accounts increased from approximately 300,000 to over 400,000 (of which approximately 100,000 are non-land revenue generating accounts). These improvements were the result of hard work, hard choices and a commitment to fulfilling our trust obligation, both on the part of the Department and on the part of Congress. The Department recognizes that maintaining this level of excellence requires continued focus: periodic review and institutionalization of trust reforms will be needed to ensure adherence to the strictest fiduciary standards.

The following list of trust reform accomplishments, achieved under the supervision of OST, is extensive, but by no means exhaustive:

BENEFICIARY RELATIONSHIP

Field Operations has:

- Improved technical and managerial support through employment of five Regional Trust Administrators with extensive backgrounds in trust management.
- Introduced 50+ Fiduciary Trust Officers to serve as the primary point-of-contact for beneficiaries on trust matters, allowing OST to proactively coordinate trust asset management activities with the BIA, tribes and individual beneficiaries in their respective geographic areas.
- Implemented the Trust Beneficiary Call Center (TBCC), stemming from the Fiduciary Trust Model's goal to improve the beneficiary trust relationship. Since its inception in 2004, the TBCC has received over 1.5million calls with a First Line Resolution (FLR) rate of 95%, compared to an industry standard among call centers at a rate of 49%.
- Successfully conducted regular outreach activities, including collaborating with law schools and legal service providers for estate planning.
- Established financial education skills training program for wealth building, beneficiary empowerment and financial planning.
- The Trust Beneficiary Call Center (TBCC) and OST field offices have responded to an extraordinary large volume of calls and "walk-ins" regarding the *Cobell* settlement payments. From December 17, 2012, to January 3, 2013, OST Field Operations (the 50 field offices and TBCC) documented 19,069 beneficiary contacts.
- Received a total of \$39,306,000 in *Cobell* Historical Accounting Class payments for 39,306 individuals whose whereabouts were unknown. As of April 30, 2014, more than

21,000 of these individuals have been located and funds disbursed or held in their Individual Indian Money (IIM) accounts per their instruction.

- Received \$16,059,000 of *Cobell* Settlement funds for 16,059 individuals whose accounts are supervised, managing those funds pursuant to its fiduciary obligation and the regulatory requirements governing supervised IIM accounts.
- Made tribal account and Statements of Performance available via the Internet. OST is also piloting the Strataweb product to provide online banking functions to individual beneficiaries.
- Led the promotion and support of self-governance and self-determination efforts related to real estate appraisals, beneficiary services and withdrawal of tribal funds.

ACCOUNTING

Trust Services has:

- Automated and centralized cumbersome, lengthy, and disparate collection systems into a one-day receipt, deposit, and distribution process.
- Implemented SEI's Trust 3000 system, off-the-shelf software used by 11 of the 20 largest U.S. bank holding companies.
- Completed comprehensive daily cash reconciliations with Treasury (approximately 40,000 financial transactions reconciled daily, totaling approximately 10 million annually).
- Received favorable audit results of its monthly and annual financial statements.
- Set up and implemented a tax compliance process, issuing over 15,700 tax forms annually.
- Established a central lockbox for leaseholders on Indian trust land to submit payments directly, instead of sending payments to BIA agency offices as was done historically.
- Disbursed an average of over \$24 million per month to acquire fractionated interests in support of the *Cobell* Settlement Land Buy Back Program.
- Implemented *Pay.gov*, where payers can submit payments online.
- Implemented a receivables system, in conjunction with Indian Affairs, which tracks anticipated funds due.
- Receipted and distributed over \$1.9 billion annually to more than 300,000 individual and tribal accounts
- Issued approximately \$1.6 billion in trust disbursements annually by check, direct deposit and debit card.
- Issued over 870,000 beneficiary statements per year, including ownership encumbrance information and improved transaction descriptions.
- Established a dedicated Probate processing team; distributing funds and closing approximately 8,100 estate accounts annually.

INDIAN TRUST RECORDS

The Office of Trust Records has:

- Established the American Indian Records Repository (AIRR) facility in Lenexa, KS. Since 2002, the AIRR has collected and indexed 271,989 boxes of Indian Affairs inactive records (the equivalent to 680 million pages) from various federal records centers, BIA

storage facilities and other locations. The information on the contents of each box is stored in a searchable electronic database.

- Issued regular Statements of Performance that includes financial transactions, encumbrance data and ownership data. The Explanation of Payments (EOP) for Oil and Gas activity that OST issues conform to the *Federal Oil and Gas Royalty Management of 1982* (FOGRMA).
- Updated trust program records in accordance with National Archives and Records Administration (NARA) standards and issued Indian Affairs Records Schedules, including fiduciary financial trust records schedules.
- Performed periodic records assessments across all of Indian country.

TRIBAL TRUST LITIGATION

The Office of Historical Trust Accounting has:

- Supported the Office of Solicitor and Department of Justice to achieve settlement for the U.S. with 81 tribes on tribal trust cases since October 1, 2010. The settlements amount to over \$2.62 billion and brought closure to historical grievances without costly litigation.
- Continued work on two major cases, and over 40 other cases in which OST has and continues to provide subject matter experts, supporting documentation and expert, fact, and 30(b)(6) witnesses.

TRUST EXAMINATIONS

The Office of Trust Review and Audit has:

- Completed over 390 trust examinations and over 460 records assessments for the period 1/1/2004 to present.
- Required BIA Agencies, Tribes and others to complete, and implement, Corrective Action Plans to address legal, regulatory and process deficiencies.

The cost for these improvements is relatively small. OST's FY16 budget request of \$142.9 million is less than 3 percent of the \$4.9 billion in trust funds it manages, and these accomplishments evidence a clear value for taxpayers and beneficiaries.

The Department can appreciate that some in Indian Country want to get back to "business as usual" now that the system is working well and the Cobell litigation is settled, but we need to ensure that any proposed reforms do not inadvertently undo the progress achieved, and do, in fact, provide genuine value and a responsible return on investment.

H.R. 812, the Indian Trust Asset Reform Act

As discussed above, OST has shown strong performance and significantly improved the trust system. OST's success story also illustrates the value of a separate organization dedicated solely to the accounting of tribal and individual trust assets, ensuring that principles of fiduciary management of trust assets are upheld. The Department does not support the termination of OST.

H.R. 812 makes significant restructuring and reorganization of Indian Affairs without taking into consideration budgetary cost implications that could result as part of its implementation. Nor does it provide assurances that the independence of OST, which enabled it to make significant improvements to the fiduciary and accountability standards for managing tribal and individual Indian trust accounts, will be maintained under the proposed new structure.

Additional analysis and the Department's position on specific provisions of H.R. 812 follow.

TITLE I—RECOGNITION OF TRUST RESPONSIBILITY

This title sets forth congressional findings regarding the United States' fiduciary responsibilities to Indians and Indian tribes.

TITLE II—INDIAN TRUST ASSET MANAGEMENT DEMONSTRATION PROJECT ACT

This title would establish a demonstration project to further the authority and flexibility for tribes to manage their trust assets outside of the Department. To participate in the project, tribes would submit to the Secretary an Indian trust asset management plan outlining how they would manage the assets and allocate funding. Under constrained timeframes, the Department would be required to apply very specific criteria to be able to disapprove the management plan. When approved, the Department would be required to provide funding for the tribe to carry out the plan.

The Department has long supported increased tribal self-governance and self-determination, and we are also supportive of program authority, similar to that found in the HEARTH Act, enacted several years ago, that would provide tribes with flexibility to manage their resources.

The Department strongly supports tribes' right to self-determination and self-governance. President Obama recognizes that federally recognized Indian tribes are sovereign, self-governing political entities that have a government-to-government relationship with the United States, as expressly recognized in the United States Constitution. Further, the Department has long supported increased tribal self-governance and self-determination. Today many Indian trust assets are managed by tribes through P.L. 93-638 contracts and compacts. Self-governance tribes currently have the authority to implement federal programs to provide services to their membership based on tribal priorities. Tribes also have the authority to withdraw funds from trust for self-management through the *1994 Reform Act*, and to lease their land without Secretarial approval under the HEARTH Act. What this title appears to do differently is transfer the authority and funding for trust asset self-management, without appropriately transferring the legal responsibility and liability for mismanagement.

The Department has consistently maintained that there should be a linkage between control of a federal program and the liability for that program. The entity most responsible for managing a program should also bear the responsibility for mismanagement. Section 205 of Title II breaks that linkage by maintaining the government's full liability.

The Department has developed and implemented sophisticated trust IT systems and processes to improve the administration of trust assets. It is our intention to allow tribes to utilize these systems and related benefits, including access to nationwide trust data, which is essential in providing services to tribal members. Without an unambiguous waiver of federal liability, the Department will be forced to develop additional computer systems to interface with what could be incompatible individual tribal IT systems and incur additional administrative support costs that are likely to increase and develop gaps in the data for both the federal and tribal systems.

One of the chief causes of the Indian trust management problems that resulted in the *Cobell* litigation and many tribal trust cases was the existence of different accounting systems from region to region, none of them actually trust management systems, many of them manual (index card based), and most of them incompatible with each other. Admittedly, there simply was no way to manage the entire trust corpus effectively with a variety of different systems being utilized across the country. The Department addressed this issue by developing a single, unified automated trust management system. It took over a decade to develop and fully implement this system, but it is now working well, and tribes and individual Indians are reaping the benefits.

In addition, it is more common than not for individual Indian beneficiaries to own assets on more than one reservation. Thus, systems that are used by a single tribe to manage its reservation resources do not work well when trying to manage individually owned resources of nonmembers who may be located far away from that reservation or on an adjacent reservation. This problem highlights a concern with H.R. 812 as introduced: any legislative reform must provide adequate safeguards for the interests of individual Indians. The Secretary has a trust duty to both Indian tribes and more than 400,000 individual Indian beneficiaries, and the Department must carry out the delicate task of balancing interests.

Title II also requires deeper consideration of attendant issues, such as how the Department would take back program responsibilities if it were required to re-assume a program, or the kind of monitoring that must be conducted to ensure a tribe is adhering to the commitments in its plan. Any incompatibility in systems or practices would stress our ability to effectively monitor or reassume the management of assets or funds if a tribe relinquished its self-management role.

While we strongly support self-governance and self-determination, it is necessary to have a management framework that provides clarity and certainty to the federal government, tribes and individual Indians.

TITLE III—RESTRUCTURING OFFICE OF THE SPECIAL TRUSTEE

Title III of the legislation would, among other things, restructure the BIA, the office of the Assistant Secretary – Indian Affairs and OST, and create an Under Secretary for Indian Affairs within the Department.

As drafted, the bill mandates that OST submit a report to Congress that outlines how OST will be dissolved and its functions absorbed by other bureaus and offices. H.R. 812 leaves it to the Under Secretary to constitute some new structure or entity that would assume OST's functions. The bill provides the Under Secretary with a broad range of discretionary authority to bring the functions performed and personnel who are employed by OST into some new unspecified structure.

Any proposed change in an organizational structure must be specific and must be carefully evaluated in order to be successful. In our view, H.R. 812, as written, lacks sufficient detail to ensure that individual beneficiaries and tribes will retain the level of care they currently receive under the Department's trust management structure.

Further, hard lessons learned from experiences of the past two decades, including the *Cobell* lawsuit and dozens of tribal lawsuits, compel the Department to recommend that any restructuring of Indian trust management should adhere to the following principles:

- OST is not special as an office within the Department, but its function is special because it is fiduciary. The Court in the *Cobell* case reaffirmed this numerous times: a fiduciary responsibility requires a higher level of care – and the best way to ensure that higher level of care at the present time is to segregate and protect those duties. Fiduciary duties related to accounting for Individual and tribal trust assets must be segregated from other Indian programs. For the foreseeable future, OST will need to remain as an integral part of the Indian trust system.
- The systemic improvements implemented by the Department should be institutionalized by creating a management structure that ensures adherence to best practices, a focus on beneficiaries and a commitment to continual reform.
- Any proposed new structure for managing the Indian trust must be supported by a business case for how that structure that ensures that tribes and individual Indians have at least the same or better services and benefits than the existing structure. We have made tremendous gains in the administration and management of the Indian Trust over the course of the past fifteen years and need to build on that achievement.
- Finally, before engaging in any restructuring, whether initiated by Congress or directed from within, the Department will need to conduct extensive tribal consultations, pursuant to Executive Order 13175, as restructuring would clearly have a significant direct effect on tribes.

We welcome the opportunity to work directly with congressional staff to develop language to address these issues in a careful manner that will thoughtfully consider the impacts it will have on both our tribal and individual Indian beneficiaries, while preserving the accomplishments and improvements we have made in the Indian trust.

CONCLUSION

The new structures and business practices put in place at the Department have greatly improved the management of the Indian trust for all future generations of beneficiaries. We must be careful to build upon the constructive progress we have already achieved together. We look forward to working with the Committee to address the challenges we face.