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House Committee on Natural Resources
Subcommittee on Indian and Alaska Native Affairs

Legislative Hearing on H.R. 409, the “Indian Trust Asset Reform Act”

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Good afternoon Chairman Young, Ranking Member Hanabusa, and members of the Subcommittee. My name is David A. Mullon Jr. I am here today to testify on behalf of the National Congress of American Indians, a membership organization of Indian tribes and individual Indians, in my capacity as Chief Counsel of the organization. It is a privilege to be here and I appreciate very much the invitation to testify before the Subcommittee in support of this important measure, H.R. 409, the “Indian Trust Asset Reform Act.”

Mostly I want to say this. Federal Indian lands are managed under a system of federal laws developed 100 years ago when most Native people were not citizens, and there were significant gaps in both language and education. The Bureau of Indian Affairs managed all tribal land under a highly paternalistic trust system where the presumptively knowledgeable Secretary protects incompetent wards.

H.R. 409 would continue the progress to a new conception of the federal trust responsibility in the context of 21st century Indian policy. Tribal governments have become much more sophisticated and after decades of adherence to the tribal self-determination policy, requiring an independent review and approval of all tribal decisions is demeaning, unnecessary, and absolutely an impediment to economic development in Indian country.

NCAI supports this bill because it helps to put elected tribal leaders in charge of their own tribal lands while maintaining the federal trust obligation through collaboration in the tribal planning process. We need to modernize the trust system, and we urge the Committee to support this legislation.

I. Background on NCAI

First, I would like to point out for the record a few things about the National Congress of American Indians, or NCAI, that the members of this Subcommittee likely already know quite well.

NCAI is the oldest and largest American Indian organization in the United States. Tribal leaders from many Indian nations across the country 70 years ago created NCAI in 1944 as a response to federal termination and assimilation policies that threatened the existence of American Indian and Alaska Native tribes. Since then, NCAI has fought to preserve the treaty rights and sovereign status of tribal governments, while also ensuring that Native people may fully participate in the political system. As the most representative organization of American Indian tribes, NCAI serves the broad interests of tribal governments across the nation.

II. Summary of Titles in H.R. 409

The Indian Trust Asset Reform Act has three titles—

Title I, “Recognition of Trust Responsibility,” sets forth (1) findings about and (2) reaffirmations of the fiduciary responsibilities of the United States to Indians and Indian tribes;

Title II, the “Indian Trust Asset Management Demonstration Project Act,” would require the Secretary of the Interior to establish and carry out a voluntary demonstration project for Indian tribes that would authorize them to allocate and prioritize federal funding, and develop and submit plans, for the management of trust assets located on the tribe’s reservation or under its jurisdiction in accordance with its own unique systems, practices, and procedures; and

Title III, “Restructuring Bureau of Indian Affairs and the Office of the Special Trustee,” would establish the position within the Department of the Interior of an Under Secretary for Indian Affairs to be appointed by the President and confirmed by the Senate, and merges the functions and activities of both what is now the Bureau of Indian Affairs and the Office of the Special Trustee for American Indians under the direct administrative control supervision of the Under Secretary.

Each of these three titles touches on issues of great importance and interest to Indian tribes and Indian people—the scope and meaning of the trust responsibility, further advancing and developing the federal policy of tribal self-determination and self-governance, and the structure and effectiveness of two agencies of the United States charged with the responsibility of administering the trust lands and resources, and otherwise protecting the interests of Indians.

NCAI strongly supports this bill for a number of reasons. In addition to reaffirming the federal trust responsibility and its underlying principles, the bill would break new ground for advancing the federal policies of Indian self-determination and self-governance through the Indian Trust Asset Management Demonstration Project Act. The bill would also change the organizational structure of the agencies in the Department of the Interior that administer Indian programs in a way that has had broad support in Indian Country for many years. In fact, both the demonstration project and the proposed restructuring have been a topic of considerable discussion in Indian Country for about a decade.

III. Historical Background on H.R. 409

Rather than parse through the various provisions of H.R. 409, I believe some of the most valuable insight that NCAI can provide to the Subcommittee at this point is an overview of the background of Titles II and III of the bill which will highlight just why it is an important bill for Indian Country.

The language, purpose, and effect of those two titles of H.R. 409 are very similar to the language, purpose, and effect of Title III and Title V of two bills that were introduced in the House and Senate about 9 years ago during the 109th Congress: H.R. 4322, introduced by Congressmen Richard Pombo and Nick Rahall, at that time the Chairman and Ranking Member, respectively, of the Committee on Resources, and its companion bill in the Senate, S. 1439, introduced by Senators John McCain and Byron Dorgan, who were at that time the Chairman and Vice Chairman, respectively, of the Committee on Indian Affairs. At that time in the 109th Congress, I was general counsel for the Senate Committee on Indian Affairs, and can state here based on personal knowledge that the Majority and Minority leadership and the staff of those Committees worked together on developing the two companion bills.

I will touch on some of the record that was developed in support of those two measures in the 109th Congress because I believe this Subcommittee will find it helpful in considering H.R. 409. However, what is not so apparent from the record is the fact that prior to the introduction of the House and Senate measures in the 109th Congress is the fact that the bills were introduced only after a significant amount of outreach to and input from Indian Country—Indian tribes, tribal organizations, and individual Indians. That outreach continued after the bills were introduced, and I believe that the continued input the Committees received was worked into draft amendments that were shared with Indian Country. It appears that some of those additional refinements may have made their way into H.R. 409.

But the main point is that the concepts behind the demonstration project in Title II and the restructuring in Title III of H.R. 409 actually originated in Indian Country, not Washington D.C.

A hearing on S. 1439 was held on March 28, 2006, and witnesses from the Administration, Indian tribes, and tribal and individual Indian organizations testified. I would urge the Subcommittee to consider that testimony, which was generally very supportive of the two titles that were the predecessors of Titles II and III of the bill today in question today. NCAI adopted a resolution at its 2006 annual session in Sacramento supporting the passage of S. 1439 (with certain amendments to provisions of the bill that are not included in or relevant to any of the provisions of H.R. 409).

Apart from the hearing testimony, I can say that at that time tribes and organizations from around the country supported the demonstration project and the restructuring—the former because it represented a significant step forward in the policy of self-governance and the latter—the restructuring—because (1) an Under Secretary would represent both a symbolic and a practical elevation of the importance of Indian affairs within the Department; (2) having a Bureau of Indian Affairs and an Office of the Special Trustee as two completely separate agencies within the Department was an awkward and unnecessary arrangement; and (3) the intent all along, when Congress created the Office of the Special Trustee, was to eventually sunset the agency, not make it permanent.

In respect to the proposed restructuring within the Department of the Interior, the witness at the hearing on S. 1439 representing the Administration, Associate Deputy Secretary Jim Cason, stated, “Interior is receptive to the concepts of establishing an under secretary and merging Indian programs under new leadership.”

Tribes have seen improvements in the accounting for trust funds at the OST, but it comes at the cost of two separate bureaucracies that make routine business much more difficult. We need to preserve the improvements made in OST, but make the whole system more streamlined so it can work better. In our view, the plan should transfer the functions of the Special Trustee and create a single line of authority for all functions that are now split between the BIA and the Special Trustee, under the supervision of an Under Secretary of Indian Affairs to supervise any activities related to Indian affairs within any of the Interior branches.

I believe that Indian Country and the Administration's agreement back in 2006 on the proposal of an Under Secretary reflected an important shared view: far more so than any other agency within the Department of the Interior, the duties, responsibilities and authorities of the Department over Indian affairs affect the lives of people and the wellbeing of entire communities—public safety; the education of Indian children; trust land management; operating irrigation systems; collecting, investing and distributing trust funds; probating the estates of decedents—the list goes on. The Department has major responsibilities regarding the lives of Indian people, and it is appropriate that the officer specifically in charge of seeing that those responsibilities are properly discharged have the higher rank of an Under Secretary.

Ultimately, neither H.R. 4322 nor S. 1439 was enacted into law before the end of the 109th Congress. The primary—possibly the only—reason the bill did not succeed is that Title I of both bills included a proposed legislative settlement of the Cobell litigation. As the Subcommittee knows, the parties to that litigation were not able to come to terms on a settlement back then—that would happen about three years later, in 2009.

Nevertheless, the popularity in Indian Country of the concepts of the demonstration project and restructuring with an Under Secretary continued on after the end of that Congress. In fact, at its 2012 annual meeting, the National Congress of American Indians adopted a resolution calling on Congress to enact trust reform legislation that would (1) restructure the Office of the Special Trustee and the BIA under an Under Secretary for Indian Affairs, and (2) increase tribal control and planning for tribal trust assets and streamline processes to expedite transactions and promote economic development, while maintaining the federal trust responsibilities.

IV. Conclusion

The basic concepts underlying H.R. 409 had their origins in Indian Country, where despite the passage of nearly a decade still continue to enjoy broad support. NCAI urges the Subcommittee to act on this bill soon so that, hopefully, it will become law in the 113th Congress. We appreciate that the Subcommittee has given its time and consideration to this important bill.