

**Testimony of
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**House Natural Resources Committee
Subcommittee on Indian and Alaska Native Affairs**

H.R. 4350, Northern Cheyenne Lands Act

May 7, 2014

Good morning Mr. Chairman and Members of the Subcommittee. Thank you for inviting the Department of the Interior to provide testimony on H.R. 4350, the Northern Cheyenne Lands Act. The Department of the Interior appreciates the diligent work of the entire Montana congressional delegation to seek an equitable solution to a vexing and complex situation regarding the ownership of the mineral estate underlying the Northern Cheyenne Indian Reservation. The Department supports the goals of the legislation and would like to work with the sponsor and the Committee on modifications to the bill.

H.R. 4350 includes significant improvements over an earlier version of the proposal on which we testified before the House Natural Resources Committee on June 22, 2011. We appreciate the efforts of the delegation to address many of the previously highlighted concerns in H.R. 4350. The issues in this bill are complex and the Department recognizes the unique role Congress can play in arbitrating difficult issues. The Department recognizes that we have a unique trust responsibility to the Northern Cheyenne Tribe and therefore we are committed to finding an equitable solution consistent with the Federal Land Policy and Management Act (FLPMA) and Department policy.

Background

The Northern Cheyenne's relationship to these lands is without dispute. Despite the Tribe's forced relocation from this area to Oklahoma in 1877, the Northern Cheyenne walked back to southeastern Montana to reclaim their ancestral lands, and the reservation was established a few years later in 1884. Today, the tribe has approximately 10,000 enrolled members; about 5,000 of those members live on the reservation. Beyond some agriculture pursuits such as cattle ranching, there are few economic opportunities for Tribal members.

In 1900, approximately 5,000 acres of the mineral estate underlying eight sections of land remained in private ownership when the boundaries of the Northern Cheyenne Indian Reservation were expanded. Great Northern Properties (GNP) is the holder of this mineral estate underlying tribal lands, which was acquired from the Northern Pacific Railway. All other mineral interests underlying the Reservation are held by the Federal Government in trust for the Tribe.

H.R. 4350

H.R. 4350 reflects the dedication of the Montana delegation and the stakeholders to resolve this complex situation. First, H.R. 4350 directs the Secretary of the Interior to take approximately 1,568 acres of Tribal-owned fee-lands into trust for the Tribe. Second, the bill conveys 5,007 acres of subsurface coal and iron mineral estate currently held by GNP within the Reservation to the Tribe, while transferring Federally-held coal interests underlying 7,952 acres in the “Bull Mountains” tracts and 1,420 acres in the “East Fork” tracts to GNP in compensation. The mineral estates conveyed to the Tribe would be held in trust by the United States for the benefit of the Tribe. The bill also includes provisions for revenue sharing and waiver of legal claims and precludes surface mining on the “Bull Mountains” and “East Fork” tracts without surface owner consent. Finally, the bill authorizes transfer of the Northern Cheyenne Trust Fund to the Tribe’s Permanent Fund.

As the Subcommittee is aware, restoring tribal homelands is one of this Administration’s highest priorities. H.R. 4350, Section 4, directs the Secretary of the Interior to take approximately 1,568 acres of land into trust for the Tribe. A portion of these lands are within the Tribe’s current reservation, but two other locations are outside the Tribe’s current reservation and are located in the state of South Dakota. The Department supports taking these lands into trust. H.R. 4350 refers to two maps, the “Northern Cheyenne Land Act – Fee-to-Trust Lands,” dated March 26, 2014, and the “Northern Cheyenne Land Act – Fee-to-Trust Lands—Lame Deer Townsite,” dated March 26, 2014, evidencing the lands to be taken into trust for the Tribe by the Secretary of the Interior. While the legislation references the maps by title, the Department highly recommends the use of legal descriptions to describe the property to be taken into trust for the Tribe.

In accordance with FLPMA and Department policy, we require equal value exchanges and completion of an appraisal consistent with Uniform Appraisal Standards when the Department enters into exchanges of land or interests in lands. H.R. 4350 seeks to address equalization based on estimated coal tonnage without standard appraisal practices or a mechanism for adjusting the acreage to achieve equal value. While the Department understands that H.R. 4350 seeks to address tribal settlement issues that are beyond the scope of FLPMA and Department of Justice regulations on equal value exchanges, we would like to work with the sponsors to ensure that the principle of equal value is maintained, and appraisals are consistent with Uniform Appraisal Standards.

The Department notes that the Federal coal interests referred to as the “East Fork” tracts may encompass part of an alluvial valley floor which may complicate the conveyance and the future development of these tracts. Under the Surface Mining Control and Reclamation Act, coal parcels occurring under or near an alluvial valley floor qualify for an exchange of the affected fee coal for unleased Federal coal if certain conditions are met. Alluvial valley floor exchanges would be processed pursuant to FLPMA. Completing such an exchange can be a lengthy and complicated process.

It should also be noted that the 60-day deadline for conveyance of mineral rights is not sufficient to complete the necessary analysis under the National Environmental Policy Act and the Department suggests changing this to a minimum of 120 days. Additionally, the Department

suggests rephrasing Sec. 5(a)(1) to avoid directing a private entity to complete a conveyance, and instead ensure that any exchange is optional on the part of the private party. Finally, the Department notes an error in Sec. 5(a)(2), which we believe should reference the map entitled “Northern Cheyenne Land Act – Coal Tracts” dated February 27, 2014.

Conclusion

Thank you again for the opportunity to testify on the Northern Cheyenne Lands Act. The Department strongly supports efforts to find a fair and equitable solution to the long-standing issues facing the Northern Cheyenne Tribe and is committed to continuing to work cooperatively towards this end. The Department welcomes the opportunity to resolve these issues for the benefit of the Northern Cheyenne Tribe. I would be glad to answer your questions.

STATEMENT FOR THE RECORD
U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
HOUSE SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
ON H.R. 409, THE INDIAN TRUST REFORM ACT
May 7, 2014

Thank you for the opportunity to provide the Subcommittee with the Department of the Interior's views on H.R. 409, the *Indian Trust 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 support the efforts of Congress to clarify Indian trust management duties, responsibilities, and expectations.

Several provisions in H.R. 409 are similar to language in trust reform legislation from previous Congresses. For example, Titles II and III of this bill are virtually identical to Titles III and IV of S.1439 from the 109th Congress. As discussed in more detail below, it is the Department's view that considerable changes to the language of H.R. 409 would be necessary to materially improve the management of the Indian trust. 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. 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 Office of the Special Trustee for American Indians was created by Congress in 1994. Prior to this, there was no organization in Indian Affairs that was solely dedicated to implementing a uniform fiduciary standard to the Department's trust responsibility over tribal and individual trust assets.

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 in all Bureau of Indian Affairs regions.

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

TRUST SERVICES

- Automated, centralized, one-day collection, deposit, and distribution process.
- Implementation of SEI's Trust 3000 system used by eight of the top 15 U.S. trust banks.
- Comprehensive daily cash reconciliation with Treasury (over 37,000 financial transactions reconciled daily (over 9 million annually).

- Monthly and annual financial statements prepared and audited by an independent accounting firm.
- Implemented tax compliance group, issuing over 15,000 tax forms annually.
- A central lockbox for payers to submit payments directly.
- Transferring an average of over \$13 million per month to acquire fractionated interests in support of the Land Buy Back Program.
- Pay.gov, where payers can submit payments online.
- Receivable system that tracks anticipated funds due.
- Over \$1.2 billion in trust disbursements issued annually by check, direct deposit and debit card.
- Over 800,000 beneficiary statements issued annually, that include ownership encumbrance information and improved transaction descriptions.
- Dedicated Probate processing team.
 - OST closes approximately 9,500 estate accounts annually.
 - 100% of estate distribution packages are automated through ProTrac.

BENEFICIARY RELATIONSHIP

- Five Regional Trust Administrators with extensive backgrounds in trust management.
- 50+ Fiduciary Trust Officers and the Trust Beneficiary Call Center (TBCC) 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.
- Outreach activities including partnering with university law schools and legal service providers for estate planning.
- Financial education skills training for wealth building, beneficiary empowerment and financial planning.
- Partnering with other Bureaus and entities to provide beneficiary services that exceed industry standards.
 - For example, since December 21, 2012, the TBCC and OST field offices have been responding to an extraordinary large volume of calls and "walk-ins" regarding the recent 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.
- OST 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 IIM accounts per their instruction. OST also received an additional \$16,059,000 for 16,059 individuals whose accounts are supervised and we are managing those funds pursuant to our fiduciary obligation and the regulatory requirements governing supervised IIM accounts.
- Implemented the Trust Beneficiary Call Center, stemming from the Fiduciary Trust Model's goal to improve the beneficiary trust relationship. Since its inception in 2004, the TBCC has received over one million calls with a First Line Resolution (FLR) rate of 95%, compared to an industry standard among call centers at a rate of 49%.
- Issue regular Statements of Performance that include financial transactions, encumbrance data and ownership data. The Explanation of Payments (EOP) for Oil and Gas activity conform to the *Federal Oil and Gas Royalty Management of 1982* (FOGRMA).
- Internet access to account and Statements of Performance for tribes. OST is also piloting the Strataweb product to provide online banking functions to individual beneficiaries.
- Promote and support self-governance and self-determination relative to real estate appraisals, beneficiary services and withdrawal of tribal funds.

TRUST RECORDS

- Established the American Indian Records Repository (AIRR) facility in Lenexa, KS. Since 2002 collected and indexed 234,208 boxes of Indian Affairs inactive records, which is equivalent to 585 million pages, from various federal records centers, BIA storage facilities and other locations; stored information on the contents of each box in a searchable electronic database.
- Issued Indian Affairs Records Schedules, including fiduciary financial trust records schedules. Updated trust program records in accordance with NARA for Indian Affairs and OST.
- Perform periodic records assessments.

TRIBAL TRUST LITIGATION

- OST's Office of Historical Trust Accounting (OHTA) and other OST programs have supported the Office of Solicitor and Department of Justice to achieve settlement for the U.S. with over 40 tribes on tribal trust cases. The settlements amount to over \$1 billion and brought closure to historical grievances without costly litigation.
- More work continues 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 *1994 Reform Act* tasks the Special Trustee with oversight for all reform efforts within the BIA, BLM, and ONRR "relating to the trust responsibilities of the Secretary..."
- OST has performed over 600 examinations for the period 1/1/2004 to present.
 - Performed 59 Records Management Assessments and issued 70 Records Assessment reports in FY 2012.

These accomplishments show that the OST does its work very efficiently from a budgetary perspective. OST's FY14 budget request, \$139.7 million, is a small fraction of the \$4.6 billion in trust funds it manages.

Perhaps the best measure of OST's success is a milestone that was achieved only last year: for FY 2013 the Department received an unmodified opinion -- a clean audit -- for the Individual Indian Money (IIM) Trust fund financial statements for the first time since the initial audit was prepared in 1995.

For FY 2013, KPMG gave the Department an A+ rating. During that time period, the Tribal and Individual Indian Monies trust balances increased from \$2.7 billion to \$4.6 billion and the number of beneficiary accounts increased from approximately 300,000 to over 400,000. 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 and periodic review and institutionalization of trust reforms will be needed to ensure adherence to the strictest fiduciary standards.

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 reforms do not reverse the progress achieved.

H.R. 409, the Indian Trust Reform Act

As discussed above, we believe that OST has shown strong performance and significantly improved the trust system in a relatively short period of time. OST's success story also illustrates the need to have an organizational structure dedicated solely to the accounting of tribal and individual trust assets that is separate from the BIA to ensure that principles of fiduciary management of trust assets are upheld. The Department is hesitant to support the termination of OST until there is some certainty that any reforms put in place will perform as well or better without a significant burden to taxpayers.

H.R. 409 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.

Moreover, while this testimony discusses some key concerns in the legislation, a more fulsome discussion of appropriate management reforms for these functions will also be informed by the Secretary's final evaluation the Final Report of the Indian Trust Commission (ITC), which completed its work in December 2013. The Secretary has assembled a team of experts to assist her with assessing the feasibility of implementing the ITC's various recommendations, and that work is on-going.

TITLE I—RECOGNITION OF TRUST RESPONSIBILITY

Title I of H.R. 409 articulates the history and scope of the Indian trust responsibility. Section 102 of Title I is entitled, "Congressional Reaffirmation of Policy," but in the Department's view some of these provisions are more a redefinition than a reaffirmation. In the course of the development of the United States' litigation position, the United States' potential liability under the fiduciary standard has largely been interpreted to be limited in scope by the parameters of written statutory and regulatory language. If Congress adopts the common-law standard in a statute, it could increase the Department's exposure to litigation for breach of trust.

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, Interior would be required to apply very specific criteria to be able to disapprove the management plan. When approved, Interior would be required to provide funding for the tribe to carry out the plan.

Interior has long supported increased tribal self-governance and self-determination. Today many Indian trust assets are managed by tribes through P.L. 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*. 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, even if a tribe is fully managing its own trust assets. 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. If tribes develop individual IT systems, the Department will be forced to develop additional computer systems to interface with what could be incompatible systems and incur additional administrative support costs that are likely to increase and 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. Title II of H.R. 409 threatens to undermine that reform by allowing for a proliferation of management systems, potentially returning the management of the trust to a condition near that which existed prior to *Cobell*.

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. 409 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 will have to 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.

A further concern with H.R. 409 is that it would encourage conditions that will tend to increase the risk of mismanagement. While we strongly support self-governance and self-determination, it is necessary to have a management framework that provides clarity and certainty to both tribes and individual Indians.

TITLE III—RESTRUCTURING BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE

Title III of the legislation would 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 would terminate OST and leave it to the Under Secretary to reconstitute some entity that would assume OST's functions. H.R. 409 provides the Under Secretary with a broad range of discretionary authority to bring the functions performed and personnel who are employed by OST into the structure. As noted above, the Department is in the process of evaluating recommendations made by the Trust Commission and any change in an organizational structure must be carefully evaluated and clearly and appropriately structured to be successful. In our view, H.R. 409, as written, does not provide that clarity to the individual beneficiaries and tribes served currently by OST and the Department.

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

- 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.

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 would encourage Congress to speak clearly in developing language to address these issues and to carefully consider the impacts it will have in allowing us to meet the objectives of both our tribal and individual Indian beneficiaries.

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.