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The National Congress of American Indians

Testimony on

Proposed Reorganization of the Bureau of Indian Affairs

Presented By:

Tex G. Hall
President, National Congress of American Indians

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Introduction

Chairman Campbell, Vice-Chairman Inouye, and members of the Committee, I thank you for your invitation to testify today on the proposed reorganization of the Bureau of Indian Affairs. On behalf of the members of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

I want to emphasize to the members of this Committee that tribal leaders understand better than anyone that the Bureau of Indian Affairs needs to change, that it has significant difficulty in fulfilling its responsibilities in management of trust funds, and that some of the problems relate to the way that the Bureau is organized. We want to see successful change and improvement in the way the BIA does business.

We are not opposed to reorganization per se, we simply want to do it right. We cannot afford to squander the opportunity we have before us.

In our view, effective organizational change to effectuate trust reform must contain three essential elements:

- (1) Standards and Accountability—a clear definition of core business processes accompanied by meaningful standards for performance and mechanisms to ensure accountability
- (2) Locally Responsive Systems—implementation details that fit specific contexts of service delivery at the regional and local levels where tribal governments interact with the Department
- (3) Continuing Consultation—an effective and efficient means for on-going tribal involvement in establishing the direction, substance, and form of organizational structures and processes involving trust administration.

These elements are lacking in the current proposal of the Department of Interior (DOI) for reorganizing the BIA.

The organizational charts which accompanied the DOI's plan show the establishment of newly created Trust Officers, potentially placed at every BIA local Agency Office. These Trust Officers are to be funded under the Administration's budget request for FY2004 for a significant initiative to increase funding for trust management within the Office of Special Trustee (OST). OST would receive a \$123 million increase – to \$275 million – which is partially offset by a \$63 million cut to the BIA Construction and an \$8 million cut to Indian Water and Claims Settlements.

Of BIA Construction accounts, Education Construction will lose \$32 million—despite a terrible backlog of new school construction needs that everyone agrees must be addressed. Tribal leaders have repeatedly emphasized that funding needed to correct problems and inefficiencies in DOI trust management must not come from existing BIA programs or administrative monies. It is critical that the DOI request additional funding from Congress to correct the internal problems created through administrative mistakes rather than depleting existing, insufficient BIA program dollars for these purposes. Increased funding for trust reform has the potential to be money well

spent—but it is an empty promise if it comes at the costs of diminished capacity to deliver services to tribal communities, and is implemented without clear standards for federal accountability, a plan to put the money at the local level where it is most needed, and consultation with the tribes and individuals whose accounts are at stake.

We are extremely concerned that the lack of definition of the responsibilities and authorities of new OST offices will cause serious conflicts with the functions performed by the BIA Agency Superintendents and/or Indian tribes. The authority and role of the proposed Trust Officers need much more explanation. Moreover, we believe that the funding and staff needs to flow directly to the agency and regional levels—not just to new Trust Officers—to address long-standing personnel shortages needed to fully carry out the trust responsibility of the United States. Before DOI begins the process of establishing an entire new mini-bureaucracy, the financial and management impact of such an action must be thoroughly examined by the Congress and by affected tribal governments.

We believe that any attempt by DOI to implement its proposed reorganization without addressing the three essential elements we have identified above for trust administration will prove to be ill-advised, premature, and ultimately disastrous. We fear that the DOI is on the verge of repeating the classic mistake that has ruined the majority of its efforts to reform trust administration in the past – a small group of executives get together and simply draw up a new organizational chart. The preoccupation with moving or creating boxes on a chart is the antithesis of how effective organizational change can and should be brought about.

We firmly believe that this reorganization is putting the cart before the horse. Organizational structures must be aligned with specific business processes and they must be designed to function within a system where services are provided by the DOI and tribal governments. DOI has not yet figured out its new business processes. Millions of dollars have been invested in an “As-Is” study of trust services, but the Department has only just begun to undertake the critical “To-Be” phase of reengineering the business processes of trust management. By implementing a new organizational plan prematurely, DOI is running a great risk of ignoring the findings of its own study and wasting the valuable resources that the agency and tribes have already dedicated to understanding systemic problems.

Reorganization should only come after the new business processes have been identified and remedies devised through a collaborative process involving both BIA employees and tribal leadership. We must include the input of tribes and BIA employees so that the great numbers of people who must implement changes in trust administration understand and support necessary reforms. Only then, as a final step, can we design an organizational chart to carry out the functions of trust management without creating conflicting lines of authority throughout Indian country. The history of trust reform is filled with failed efforts that did not go to the heart of the problem and do the detailed, hard work necessary to fix a large and often dysfunctional system.

At this time, Congress should prevent the DOI from proceeding with its proposed reorganization plan and focus instead on funding land consolidation that will in time reduce the cost of trust administration, and on developing good systems for the core trust business processes: land title, leasing and accounting. Without adequate land title, leasing and accounting systems, reorganization, especially as proposed by DOI, does little to effectuate true trust reform and the cost of reform of trust administration will continue to escalate.

Land Consolidation

Addressing fractionation is critical to improving the management of trust assets. Fractionation promises to greatly exacerbate problems that currently plague the DOI's efforts to fulfill its trust responsibilities, diminish the ability to productively use and manage trust resources, and threaten the capacity of tribes to provide secure political and economic homelands for their members. If allowed to continue unabated, fractionation will eventually overwhelm systems for trust administration and exact enormous costs for both the Administration and tribal communities.

Reduction of fractional interests will increase the likelihood of more productive economic use of the land, reduce record keeping and large numbers of small dollar financial transactions, and decrease the number of interests subject to probate. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. Given this, we do not understand why the FY2004 Administration request proposes a \$123 million increase for OST, but only a \$13 million increase (to total funding of only \$21 million) for the land consolidation program. Congress needs to put funding directly on the problem, and we believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system, including reorganizing the BIA.

Core Business Systems - What are We Trying to Fix?

Over the decades, Indian tribes have witnessed a multitude of trust reform initiatives, reorganizations, plans, meetings, summits, work groups, task forces, computer systems, software, outsourcing contracts, and other efforts to fix the problems with management of Indian trust funds. To date, none of these efforts have proven successful. The DOI has failed to correct fundamental deficiencies in core systems that are the essential to trust funds accounting and trust resource management. NCAI believes that this Congress should focus its oversight efforts on these core systems to ensure that reform efforts meet requirements for fiduciary trust fund administration.

Indian trust fund administration requires accountability in three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. These core systems must be accurate and integrated, timely, and be subject to credible standards and oversight.¹ Pursuant to the 1994 American Indian Trust Funds Management Reform Act, these are exactly the systems that the Special Trustee should address. The Secretary must be able to provide to the beneficiaries an accurate and timely statement of the source, type and status of the funds; the beginning balance; gains and losses; receipts and disbursements; and the ending balance. 25 U.S.C. § 4011. Correcting the DOI's performance in these core functions will also require the DOI to employ sufficient personnel, provide staff with proper training, and support their activities with adequate funds.²

Title - The title and ownership system is the most fundamental aspect of the trust system. DOI cannot accurately collect and distribute trust funds if it does not have correct information about the owners of the trust assets. This is the starting point for any effort to fix the trust system.

¹ The DOI acknowledges that the poor quality of title and realty information is caused "by a lack of standards and quality control and a lack of integrated systems." DOI Plan at 31.

² The DOI Plan acknowledges that "the personnel resources are inadequate to address the current workload." (DOI Plan at 38).

Maintaining accurate ownership information is made exceedingly difficult by the ever-expanding fractionated ownership of lands divided and redivided among heirs. Today, there are approximately four million owner interests in the 10 million acres of individually-owned trust lands, and these four million interests could expand to 11 million interests by 2030. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually-owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest.

Currently, the BIA is using ten different title systems in the various Land Title Record Offices around the country, both manual and electronic. These systems contain overlapping and inconsistent information. The systems are largely "stand alone" in that they do not automatically reconcile the ownership information in the agency offices, in tribal records, or in the lease distribution records that are used for daily operations. Because records management standards and quality control procedures are lacking, there is no assurance that title records are accurate. These inaccuracies result in incorrect distribution of proceeds from trust resources, questions regarding the validity of trust resource transactions, and the necessity to repeatedly perform administrative procedures such as probate.³

Consequently, a large backlog of corrections has developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions that rely on title and ownership information. In turn, each of these delays compounds the errors in the distribution of trust funds. *See, Draft As-Is Model Preliminary Findings, Electronic Data Systems, December 20, 2002.* Cleaning up the ownership information and implementing an effective title system that is integrated with the leasing and accounting systems is a primary need for the Indian trust system. NCAI encourages this Congress to ensure that expeditious reforms are made to the title system. The reorganization proposal, which is focused on developing oversight capacity at OST, appears to do little to address this most fundamental problem at the BIA.

Leasing – Most Indian trust transactions take the form of a lease of the surface or subsurface of an allotment, permits to allow the lessee to conduct certain activities in return for a fee, or a contract for the sale of natural resources such as timber or oil. Although leasing records are vital to ensure accurate collection of rents or royalties, there are no consistent procedures or fully integrated systems for capturing this information or for accurately identifying an inventory of trust assets. Currently, BIA has no standard accounts receivable system and many offices have no systems to monitor or enforce compliance, or to verify and reconcile the quantity and value of natural resources extracted with payments received. The accounting system most often begins with the receipt of a check that is assumed to be accurate and timely. Implementing an effective lease recording system that is integrated with the title and accounting systems is a primary need for the Indian trust system, but the BIA has only recently begun to investigate possible technologies for this effort. NCAI urges Congress to ensure that the information management and administrative systems put in place are organized to provide accurate and timely information regarding the trust resource transactions that produce the income that is deposited into trust fund accounts.

³ Another problem is the backlog of probate determinations. The process of ascertaining the multiple owners of an allotment is often delayed for years – sometimes seven years or more – by the scandalously backed-up Indian Probate Office. This is one phase of the accounting process in desperate need of reform.

Accounting - The 1994 Act requires the Secretary to account for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian" 25 U.S.C. § 4011. The DOI needs to develop accounting systems that will integrate and verify information from one function into another (from title to leasing to accounting). The DOI should also set out what oversight capabilities are planned into the system (verification and audit) as well as a plan for document retention and ease of access to facilitate audit and internal verification procedures. Furthermore, the DOI system needs a built-in cross-check between BIA entries to its control account and Treasury's entries to its control account. This system should automatically produce a daily exception list that would be examined and remedied in a timely manner.

By its own representations, the Government makes clear that it still lacks a cohesive, integrated strategy for fulfilling this fiduciary duty to accurately account for trust funds balances. Rather than focusing attention and energy on a reorganization, Congress should ensure that DOI develops the core trust systems – title, leasing and accounting – to ensure that those systems provide accurate information regarding the trust corpus as well as trust resource transactions that produce income that is deposited into trust funds on behalf of individual and tribal beneficiaries. Once these processes have been developed, an organizational structure can be developed to ensure their proper implementation.

Accountability and Standards

It is well known that DOI has mismanaged the Indian trust for decades. The real question for Congress is why decades of reform efforts have produced so little change in DOI's willingness to take corrective actions, to reconcile accounts, and to put adequate accounting and auditing procedures and policies in place.

The real answer to this is that the DOI and the Department of Justice have always viewed their primary role as ensuring that the U.S. is not held liable for its failure to properly administer trust assets. For this reason, they have never been willing to put any standards into regulations to govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new culture of transparency and accountability for Indian trust management. Once the DOI understands that mismanagement will no longer be tolerated, the system will change and true reform will begin. In effect, the DOI is acting as a bank for Indian trust funds -- and just like every other bank in the U.S., the DOI must be subject to standards and accountability.

Beyond the issue of reorganization, we believe that it is critical for Congress to substantively address the underlying issues of transparency and accountability in fixing the trust system. We would greatly encourage the Committee to take up trust reform legislation that would hold the DOI to the ordinary standards of a trustee, and we would be pleased to work with you in developing that legislation.

Reorganization of the Bureau of Indian Affairs

Tribal leaders very much agree with the goal of the proposed reorganization to ensure accountability for trust management throughout all operational levels. However we have a great concern that a "stove piped" reorganization, such as the current proposal, will sharply separate the ability to make decisions on trust resource management and trust services at the local level, and will put an unbearable level of bureaucracy into a system that is already overloaded with bureaucratic requirements. In short, tribal leaders want to ensure that decision-making and resources are placed at the local level. Tribes believe that the Department must maintain a single point of decision making authority at the local level to deal with issues that cut across both trust resource management and other trust services.

Reservations are active, developing communities that are very dependent on trust property, and need decisions made on routine matters at the local level in a reasonable time frame. For example, all of the major infrastructure activities like housing, roads, irrigation, drinking water, telephone service, etc. take place on trust land. There are also quite a number of important daily relationships at the local level regarding the provision of social services to elders and minors, and the management of their IIM accounts. Social workers, medical professionals and Superintendents work together to set up restricted accounts and approved spending plans for the protection of their trust funds. BIA and tribal law enforcement also must regularly deal with activities that take place on trust lands, deal with trust resources, or relate specifically to leasing activities. Examples of such circumstances include problems of trespassing cattle and the remedies under a grazing lease for impoundment or fees, timber theft and timber leases, violations of irrigation and water rights, eviction of a tenant for nonpayment on a lease, etc.

All of these types of decisions require strong coordination and decision making at the local level on matters that affect both a trust resource interest and the broader trust responsibility to provide services. These make up the routine kinds of decisions local BIA officials make that often never reach the central office level.

Imagine having to get central office approval every time there is a disagreement over a housing lease approval or construction of an irrigation ditch – this is something tribes don't want and we don't think the DOI wants either. Central office decisions take a long time – and this means more business deals go stale, more financing dries up, projects don't move forward, and the cycle of missed opportunities for Indian country is badly exacerbated.

We believe that trust reform reorganization can be effective in improving administrative accountability while still allowing for local decision making on routine matters that cut across trust resource management and trust services. We generally agree with the DOI that it would be valuable to group the trust funds management and the trust resource management activities at the local level, with clear lines of responsibility and staffing. However, we do not believe that the individuals responsible for these functions should be under a separate administrative authority from the staff responsible for performing other trust services. Rather, the BIA Regional and Agency office authorities should remain as the primary focal point of contact with individual tribes, preserving local control of functions and programs to support tribal self-determination. Accountability is not going to be assured through any organizational structure, but we believe it can be achieved in part with the following improvements:

- Identification of duties
- Adequate funding, staffing and training to perform those duties
- Policies, procedures, standards
- Internal controls
- External audits (performance and financial)
- Transparency (basis for decisions is clearly stated and evident)
- Adequate staff training with performance standards
- Focus on responsiveness to beneficiaries
- DOI/BIA staff committed to change and improvement of trust activities

In broad terms, tribal leaders have supported the idea of creating a structure that would have three major operational divisions under the Assistant Secretary for Indian Affairs: 1) Trust Funds and Trust Resources Management; 2) Trust Services (such as law enforcement, social services, roads, etc.); and 3) Indian Education. An administrative services section to handle such functions as budget, personnel and information systems would support these three divisions. Central office functions within these divisions could include: (1) the establishment of standards, procedures, protocols, internal controls for accountability, and program priorities; (2) delegations of authority to regional offices; (3) technical assistance; (4) reporting and troubleshooting; and (5) development of budgetary needs. The tribal leaders who participated in a Trust Reform Task Force with DOI suggested that the Office of Trust Funds Management and other offices, which are currently or prospectively under the administrative control of the OST, would be phased back into the BIA in order to have integrated beneficiary services. This is essential to maintain accountability; by having these offices report to the OST, the OST is placed in the tenuous and untenable position of overseeing itself.

Continuing Involvement of Tribal Governments

Tribal governments must be substantively and continuously involved in trust reform efforts, working in partnership with Congress and the Administration. Trust Administration goes to the heart of government-to-government relationships and to the capacity of tribal governments to exercise their sovereign powers and ensure that the rights and interests of its members are protected and well served. Tribal governments have a great deal at stake in developing effective mechanisms for trust administration within unique political-legal-economic relationships with the United States. We urge Congress to make every effort to ensure that tribes are “at the table” when critical decisions regarding trust reform are being made.

Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment by Congress, the Administration, and Tribal Governments to work collaboratively together to make informed, strategic decisions on key policies and priorities, we can provide the guidance necessary to bring about true reform in trust administration.