LUMMI INDIAN BUSINESS COUNCIL
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TESTIMONY OF HENRY M. CAGEY
COUNCIL MEMBER OF THE LUMMI NATION
ON
H.R. 215, THE AMERICAN INDIAN EMPOWERMENT ACT

Hearing before
the House Committee on Natural Resources
Subcommittee on Indian, Insular & Alaska Native Affairs
October 25, 2017

Good morning Chairman LaMalfa, Ranking Member Torres, Chairman Young, and Subcommittee Members. My name is Henry Cagey. I am a senior Council Member of the Lummi Nation and a former Chairman. I am here representing the Lummi Nation, which serves as co-chair of the Tribal Economic Growth Alliance.

BACKGROUND ON THE LUMMI NATION

The Lummi Nation is located in Northwest Washington State along the shores of the Salish Sea near Canada. Our territory is approximately 12,000 acres and most our 5,000 people live on or near our territory. We have survived for many generations as fisherman and we constitute the largest tribal commercial fishing fleet in Indian Country.

On January 22, 1855 at Point Elliott, our ancestors entered into a treaty with the United States that established peace between our two peoples and secured a portion of our traditionally occupied lands and waters. This treaty relationship serves as the basis for our modern government-to-government relationship.

In 1988, the Lummi Nation was one of the first 10 federally-recognized tribes that were part of the Indian Self-Governance Demonstration Project authorized by Congress. The Self-Governance program was dedicated to taking control of federal dollars allocated for our people and recognizing the authority of our tribal government to administer those dollars. The basic idea was to support local government control and decision making at the tribal level.

Self-governance is now permanent and there are over 250 tribes that are participating in the program within the Departments of Interior and Health and Human Services. In my view, and many others, it is an unqualified success. We are now approaching the 30th anniversary of Indian Self-Governance and we must continue to build new ways to expand it.

H.R. 215 – the American Indian Empowerment Act – is an opportunity to expand tribal self-governance over our tribal land use. This legislation should be supported because it is a continuation of 30 years of federal Indian policy. Every tribe – at its choosing – should have the sovereign right to regain its land title and have full authority to enact laws to regulate its own land use.

WHAT WOULD THE AMERICAN INDIAN EMPOWERMENT ACT DO?

The American Indian Empowerment Act would allow a federally-recognized Indian nation or tribe – at its choosing – to convert all or a part of its existing tribal trust lands into restricted fee lands that it owns. It would preserve the status of those lands as Indian Country under the sovereign authority of the tribal and federal governments and outside the jurisdiction of the state and local governments. It would restore tribal government as the exclusive regulators of tribal lands. In other words, it would reduce the role of the Bureau of Indian Affairs to control our tribal land use.

WHAT IS THE DIFFERENCE BETWEEN TRUST LANDS AND RESTRICTED FEE LANDS?

Under federal law, Indian Country is defined to include both "trust lands" and "restricted fee lands." Trust lands means that the United States holds title to the tribal land for the benefit of the tribe or individual Indians. In contrast, restricted fee lands are defined as lands where the tribe or an individual Indian holds title, but can only sell it or encumber it with the approval of the federal government pursuant to federal law.[1]

Trust lands and restricted fee lands are basically the same for purposes of jurisdiction.[2] Both types of tribal land are considered "Indian Country" under federal law.[3] Tribes, in the exercise of their sovereign authority, exercise primary authority over both types of lands.[4] The federal government, if need be, can also exercise authority over both types of lands.

Most importantly, both trust lands and restricted fee lands are subject to the protective trust responsibility of the United States. This ensures that such lands are not sold or alienated without federal authorization, or become subject to state or local regulation and taxation. The federal law that protects restricted fee Indian title is the Non-Intercourse Act, which was originally enacted by the Congress in 1790.[5]

So, what then is the difference between trust lands and restricted fee lands? Trust lands are owned by the United States and restricted fee lands are owned by the tribe. Because trust lands are considered to be owned by the United States, such lands are subject to direct regulation by the BIA. Historically, this means that every decision relating to tribal land use is subject to BIA approval. This added layer of regulation and control is burdensome. It interferes with the sovereign authority of the tribal government to determine what is the appropriate use of our own land.

Restricted fee lands are not owned by the United States and, thus, are not directly managed by the BIA. Tribal governments are the exclusive managers of tribal land use under

tribal law. This approach streamlines land use regulation and makes it easier for development for such things as housing or businesses.

Some have suggested that restricted fee land is more at risk of state jurisdiction, state taxation, or potential loss of tribal sovereignty. This is not my understanding, since restricted fee lands are no different than trust lands for purposes of jurisdiction.[6]

Restricted fee lands are not a new concept. Restricted fee Indian Country has existed since the beginning of the federal-tribal relationship. I understand that the Six Nations of the Iroquois Confederacy retain original title to their lands and have been considered restricted fee Indian Country since the United States was founded. The U.S. government has no role in the regulation of Six Nations lands use.

In sum, while restricted fee lands and trust lands have some similarity, the main difference is that owning restricted fee lands preserves and respects the self-governance of tribal governments.

WHY THE LUMMI NATION SUPPORTS ENACTMENT OF THE AMERICAN INDIAN EMPOWERMENT ACT

The Lummi Nation supports the American Indian Empowerment Act because we wish to restore exclusive use of our own land. I say "restoration" because we owned our land at the time we entered into our treaty with the United States in 1855. For some reason, however, our lands have been considered to held "in trust" under federal ownership. I think the reason is because the BIA wanted to control our lands and our people. Because of this approach, we have had seven generations of paternalism.

Why does owning our own land matter? Because we believe in self-governance and we want to exercise maximum authority over our own land. We are currently doing this through the self-governance program in many areas already. We want the ability to eliminate BIA approval for any decisions relating to our land use. Even if it is only for one acre of land, it will be important option for us.

Specifically, we would like to more easily utilize our lands for economic development. Having to ask permission of the BIA before we pursue development is burdensome and demeaning. We want to clear the way to promote investment, establish businesses, create jobs, and rebuild our own economy. We want our freedom back.

I'll give you an example of the problem. When I was our tribe's economic director, we spent two years trying to put up a sign on our trust lands to advertise our tribal enterprises. The BIA made us rewrite our plan two times, with months lost going back and forth between us and the Bureau. And this was simply to put up a sign to advertise our enterprises and not even regulate our land.

The Lummi Nation is fully capable of regulating our internal land use for leasing and economic development. We do it already under Title 15 of the Lummi Code. We believe that

our treaty relationship means that the federal government must protect our lands and waters, but not regulate them at the expense of our tribal government decisions.

WHY THE AMERICAN INDIAN EMPOWERMENT ACT IS A NEW CHAPTER IN TRIBAL SELF-GOVERNANCE

We have come a long way since the Self-Determination Act was established in 1975. The Self-Governance Act has expanded to the Departments of Interior, Health & Human Services, and Transportation. We urge Congress to continue with this federal Indian policy regarding land ownership and land regulation.

Both the Congress and Indian Country know full well the benefits of tribal self-government over land use. In 2012, the Congress enacted the HEARTH Act to establish a process to allow tribal government leasing authority of trust land for up to 50 years. The HEARTH Act is a significant development in recognizing tribal government authority to lease trust lands. While the BIA must approve a HEARTH Act tribal leasing ordinance, implementation is subject to the authority of the tribal government.

The American Indian Empowerment Act furthers this process of recognizing tribal sovereignty to regulate land use. It would streamline tribal land use decisions and eliminate the BIA from the land management process. The United States would remain responsible for protecting our lands from confiscation or regulation by outsiders, but it would no longer be involved in our internal land use decisions. That, in my view, is what sovereignty is all about.

CONCLUSION

In conclusion, I realize that there are many threats that we as Indian people face and that many of those threats focus on our lands and resources. H.R. 215 is one step closer to regaining full self-government over our land use. Not all tribes may wish to pursue restricted fee lands, and that is their sovereign choice. But for those of us who seek this option, the Congress should continue with over 50 years of Indian policy that supports tribal self-determination and self-government.

Owning title to land, and having our ownership recognized, is an essential attribute of humanity. Historic policies of the United States have denied that right to indigenous peoples. It is one reason why our people continue to live in poverty in so many places. The Lummi Nation is willing to do our part to invest, create opportunities, and employ our people and our neighbors. The American Indian Empowerment Act will expand our ability to exercise our sovereign right of self-governance.

Hysh'ke. Thank you for the opportunity to testify today.

[1] 25 C.F.R. § 162.003.

[2] *See Citizens Against Casino Gambling in Erie County v. Hogen*, (W.D.N.Y., Jul. 8, 2008) at 69 ("Congress has treated trust land and restricted fee land as jurisdictional equivalents in a number of Indian statutes of general applicability.").
[3] "Indian Country" includes "reservations", "dependent Indian communities", and "allotments". *See* 18 U.S.C. § 1151. Tribal nations owning lands in restricted fee status are Indian Country. *See U.S. v. Sandoval*, 231 U.S. 28 (1913) (Pueblos); *Indian Country U.S.A., Inc. v. State of Oklahoma*, 829 F.2d 937 (10th Cir. 1987) (Creek Nation); CACGEC, *supra* (Seneca Nation).
[4] *See Citizens Against Casino Gambling in Erie County v. Chauduri*, (2nd Cir. 2014), at 55-57.
[5] 25 U.S.C. § 177; 25 C.F.R. § 151.2(e).
[6] *See* CACGEC, *supra* note 2 at 70 ("[W]here land is held in trust or is subject to a restriction against alienation imposed by law, a state is without jurisdiction over the land except as permitted by the federal government.").