

SANTA CLARA

POST OFFICE BOX 580
(505) 753-7330
(505) 753-5375 Fax



INDIAN PUEBLO

ESPANOLA, NEW MEXICO
87532
OFFICE OF GOVERNOR

Written Testimony of J. Michael Chavarria Governor, Pueblo of Santa Clara

H.R. 215, the "American Indian Empowerment Act of 2017" Indian, Insular and Alaska Native Affairs Subcommittee of the House Natural Resources Committee October 25, 2017

Introduction. Thank you, Chairman LaMalfa, Ranking Member Torres, and members of the Subcommittee, for this opportunity to testify on the American Indian Empowerment Act of 2017. I would like to express my appreciation to the Subcommittee Members and their staff for their support and understanding during this period of unexpected loss for the Naranjo family and our community. My name is J. Michael Chavarria and I am the Governor of the Pueblo of Santa Clara, located in north-central New Mexico and one of only five self-governance tribes in the state. I also serve as Secretary of the All Pueblo Council of Governors, representing 20 Pueblos in New Mexico and Texas, and as Co-Chair of the EPA Region VI Regional Tribal Operations Committee.

H.R. 215 – An Intriguing Direction. H.R. 215 is intriguing to Santa Clara for two central reasons. First, Santa Clara has embarked on a multi-generational effort to restore our forests and watershed after the devastating Las Conchas wildfire of 2011. This effort has entailed substantial involvement by our federal partners, particularly at the Federal Emergency Management Agency, the United States Army Corps of Engineers, Department of Interior and Department of Agriculture. Yet, for this restoration to continue to go forward efficiently, we cannot allow excessive or duplicative federal laws and regulations to hinder our efforts, especially where and when Santa Clara has its own laws, regulations, or customs in place that address those same issues.

The second major reason Santa Clara is interested in this legislation is because we are a self-governance tribe. We sought self-governance status because we believed that we could govern our own programs and our own lands best – and this has proven true – but we have realized that self-governance, as currently defined, is not enough. It is focused on the administration of federal programs and funds by tribes, which is good, but we seek more. The natural question is "What comes next after self-governance?" The ideas in H.R. 215 may provide an answer to that question by providing a path towards a stronger expression of tribal sovereignty, in a way that is not only good for tribes, but also for their surrounding non-Indian communities as they benefit from improved tribal economies.

Although the proposed legislation is intriguing, it is still hard to understand all of its possible ramifications, including its potential impact on the federal government's trust responsibility. Therefore, while we thank you for this hearing, we also suggest that you hold further hearings and targeted consultations throughout Indian Country to identify ways to strengthen and clarify the bill.

Las Conchas wildfire. In 2011, the Santa Clara Pueblo was devastated by the Las Conchas Fire, then the largest wildfire in New Mexico history. Although mercifully no lives were lost and no homes were burned, we still saw our traditional and treasured homeland and spiritual sanctuary, the Santa Clara Canyon, practically destroyed. We estimate that more than 16,000 acres of our forestlands were burned, which—when combined with the lands we lost in the Oso Complex Fire of 1998 and the Cerro Grande Fire of 2000—has resulted in the destruction of 80% of our forests and a huge part of our communal heritage. In addition, the fire burned thousands of acres of our traditional lands, including the lands of our origin, the P'opii Khanu, which are the forested headwaters of the Santa Clara Creek, as well as numerous other cultural and traditional sites of great importance to us. In addition, the loss of the forest is devastating to wildlife and wildlife habitat, recreational resources, and to the purity of the water that we use for irrigation and traditional purposes. Throughout this ordeal, the Santa Clara people have shown grit and determination as we journey the long road to recovery. While my generation may never see the canyon in its glory again; our efforts strive to ensure that will not be said for future generations.

Because of the altered hydrology and geomorphic changes to the land, the Pueblo remains in danger of a catastrophic flood, but that danger has been substantially mitigated by the construction of three large gabion structures in the canyon, as well as other water control activities. Although significant progress has been made, more work remains to be done to ensure effective responses to natural disasters in our community and in Indian Country.

The complex process of preparing for the floods and restoring the canyon. Santa Clara has had five Presidential Disaster Declarations: three by the request of the State of New Mexico and two by the Pueblo after the Stafford Act was amended. Overall, the ability to directly request Presidential Disaster Declarations has given Santa Clara Pueblo greater control over our own disaster relief efforts. Further, implementation of FEMA's National Disaster Recovery Framework (NDRF), which facilitates inter-agency collaboration, has been helpful to Santa Clara in assuring a comprehensive and coordinated effort among our partners. Our experience has raised numerous, interrelated, short and long-term concerns for Santa Clara and other surrounding communities, almost all of which intersect with federal laws and regulations.

Federal resources play a huge role in helping us address this complex scenario; but duplicative federal laws and regulations have the potential to significantly hamper this effort. As an illustration, the Santa Clara Forestry Department was ready to begin timber cutting and recovery on several sections of burned forest following but needed the BIA's help with National Environmental Protection Act ("NEPA") forms. Santa Clara's work was delayed because these NEPA clearances were delayed, even though the underlying NEPA-compliance work had already been completed and the clearances were really only of a "box-checking type" that BIA trust resources staff could often complete in a single visit. Instead of quick approval, based on advice from Interior solicitors, the BIA staff indicated that they could not sign-off on the clearances because the project was receiving its funding from the U.S. Forest Service and the State of New Mexico. The frustrating reality is that this is our land and our sacred resources, and

it has been for a thousand years. We know how to take care of these sites, and we have the internal laws and customs to address them. If our regulations were preeminent, this kind of bureaucratic delay would have been avoided.

Going beyond self-governance: as a leader in forestry management, Santa Clara is ready to put in place comprehensive laws and regulations regarding its forested lands. Santa Clara has a large forestry department, numbering some 40 personnel. The department is widely regarded as outstanding. Santa Clara fire crews and equipment were on the front lines in fighting the Las Conchas wildfire, and the department works diligently every day to protect our lands from future threats. We are committed to the maintenance and restoration of healthy forests on, around, and adjacent to the Pueblo. None of the four fires we have faced in the past decade—the Oso, Cerro Grande, South Fork, and Las Conchas—have originated on our lands. Although fate plays its part, we have suffered the repeated and severe consequences of these disasters largely due to the failure of others to properly guard against causing a fire.

For the last several years, Santa Clara has been working with the U.S. Forest Service, the BIA, and others in an effort to establish a forest management plan to prevent another catastrophe. The effort has entailed countless meetings in New Mexico and numerous trips to Washington. In particular, Santa Clara is working on establishing a partnership under the Tribal Forest Protection Act ("TFPA") with the Forest Service to address the long-term health of Forest Service lands around the Pueblo. We believe that collaborative and effective forest management under the TFPA provides a natural complement to our efforts in preventing catastrophic fires and floods, as well as to the objectives of H.R. 215 in advancing the exercise of tribal sovereignty and efficient land management. The TFPA empowers tribal governments to manage both tribal lands and adjacent federal lands, while also advancing tribal and federal interests in the development of land resource and management plans.

Santa Clara supports the concepts underlying H.R. 215, but greater clarification on the scope and application of its provisions is needed to strengthen the bill. First, Santa Clara believes that the preemption of tribal jurisdiction over conveyed restricted fee lands should only be established and implemented at the voluntary request of a tribal government. It should not be a mandatory provision. The decisions to participate in or to opt-out of the new legal regime created under this bill are equal expressions of tribal sovereignty. The bill's stated goal of empowering tribal governments to accept restricted fee tribal lands, and thereby exercise preemptive tribal jurisdiction over them, should not be conflated with *mandating* such an action. Not all tribal governments have the internal capacity or the interest in assuming expanded responsibilities for their lands. As currently drafted, however, it is unclear whether our governments have the authority to opt-out of the bill's preemptive effect.

Similarly, it is also unclear whether the conveyance of trust lands into restricted fee status signifies a permanent change, or whether the land can later be converted back into trust. For consistency with the bill's underlying goals, tribes should have the ability to convert land back into trust. Tribal leaders could work with the Department of the Interior to identify the best means of handling this process. Santa Clara recommends that Congress consider an accelerated review process for converting restricted fee lands under this bill back into trust as the lands had already been subject to extensive federal review when they were originally taken into trust.

However, we also recognize that substantial changes in the use of the land may warrant additional consideration, particularly in regards to triggering an environmental review process under the National Environmental Policy Act. The provisions of H.R. 215 should be expanded to address these concerns and lay out a clear process for the Department to follow in taking restricted fee lands back into trust.

Second, greater clarification is needed as to the scope of applicable federal and tribal law under this bill. For instance, the bill provides tribes with the authority to lease, grant easements over, or rights-of-way across restricted fee lands, notwithstanding the provisions of the Indian Long-Term Leasing Act, 25 U.S.C. § 415. However, the bill does not address whether and how this provision would interact with other federal statutes that relate to the leasing or encumbrance of Indians lands, such as the Native American Housing and Self-Determination ("NAHASDA"), the management of Indian agricultural lands under 25 U.S.C. § 3703, or other tribe-specific statutes, to name just a few of many available examples. Without further explanation, there is a risk that cumbersome bureaucratic review processes will develop to determine the applicability of other federal statutes each time that a tribe seeks to exercise its leasing or land use authority—which would be the very type of bureaucratic inefficiency that the bill was designed to alleviate.

Relatedly, the bill also does not address which tribal laws and regulations constitute a "system of land tenure" for the purpose of preempting federal laws governing the use of restricted fee tribal lands. The term needs to be defined so that tribal governments, the Departments of the Interior and Agriculture, and other stakeholders have a firm understanding of which federal laws can be preempted and the scope of applicable tribal law along with any continuing or independent federal oversight responsibilities.

Third, and perhaps of most importance, we believe that the bill's language must make it abundantly clear that the expansion of tribal jurisdiction does not come at the expense of a diminished federal trust responsibility. Section 2(e) of the bill expressly provides that "Nothing in this section shall be construed to diminish the Federal trust responsibility to any Indian tribe." While the provision appears clear on its face, a closer look at its practical implications reveals a seemingly paradoxical situation in which the preemption of federal statutes without further savings language may necessarily result in the diminishment of any—and potentially all—federal trust responsibilities conferred in or defined by those statutes. The net effect would be the diminishment of the federal trust responsibility as exercised in relation to tribal trust and restricted fee lands. We strongly recommend that additional language be incorporated into H.R. 215 to identify how the federal trust responsibility will be maintained in its full and undiminished form when a tribal government elects to participate in the bill's preemptive legal regime.

The language should also include a discussion on the ongoing role and liability, if any, of the Department of the Interior, when the status of tribal lands is changed under the bill. Santa Clara believes that the Department should remain liable for maintaining access to and the quality of natural resources that may impact restricted fee lands, such as waterways, air quality levels, adequate fire protections, and other environmental measures. Additional guidance from Congress is needed to clarify this issue.

Some key questions related to H.R. 215. As I have testified, Santa Clara finds H.R. 215 to be very intriguing. However, important questions remain to be answered as this legislation develops, such as:

- The core land holdings of the Pueblos in New Mexico are already held in restricted fee status, as they were titles held by the Pueblos under the prior sovereignty of Spain and Mexico. How would these lands be affected by H.R. 215?
- How would the legislation impact the trust responsibility, which we do not want to see diminished in any form?
- Will tribes be able to choose to opt-in or even opt-out of this new legal regime? Will the decision to convert trust lands into restricted fee status be reversible and, if so, how will that be carried out by the Department of the Interior?
- Does Section 2(d)'s preemptive effect apply to all federal laws on converted restricted fee tribal lands, only certain federal laws, or any other restrictions on its scope?
- How will the tribal preemption status be invoked? Would there be some sort of certification process?

Conclusion. Thank you for the opportunity to testify on behalf of this compelling legislative proposal. Never again in our lifetime will we see our traditional and treasured homeland and spiritual sanctuary, the Santa Clara Canyon, as we have known it. It will take generations for our community and lands to recover from the devastation of fire and floods. But this is our only homeland; it is the place we have been entrusted with since time immemorial. While we intend to devote the resources we can to the healing of our land and the protection of our people, we do not have the resources to do it alone. We turn to our federal partners and ask for your sustained assistance in assuring the remediation of our sacred homeland and developing laws like H.R. 215 to eliminate bureaucratic and duplicative requirements that only delay restoration and recovery.