Indian Land Tenure FOUNDATION

WRITTEN TESTIMONY OF CRIS E. STAINBROOK
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before the

COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS

HEARING ON

AMERICAN INDIAN EMPOWERMENT ACT OF 2017

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INTRODUCTION

Hau. Pidamayaye wakaska yuza. Emaciyapi Cris Stainbrook. Hello, my thanks to the leadership of the Committee for inviting me today. My name is Cris Stainbrook and I am President of the Indian Land Tenure Foundation (ILTF). I am happy to be able to provide brief comments on the American Indian Empowerment Act of 2017. I will be brief as I am submitting this written testimony in advance. In short, the Foundation believes this legislation will open considerable opportunities for the many of the Native nations ILTF works with but will not be suitable for other Native nations. Most importantly, each Native nation will make the decision to participate or not.

BACKGROUND ON THE INDIAN LAND TENURE FOUNDATION

ILTF was formed in 2002 as a non-profit to work with the community of Indian people and Native nations working toward the recovery of lands alienated from Indian ownership. The Foundation's mission is: Land within the original boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest are in Indian ownership and management. ILTF works in the mode of a community foundation. The Foundation's geography is Indian Country but unlike most community foundations, ILTF focuses on the singular set of issues surrounding Indian land. Ultimately, the Foundation seeks to assist the tribes and Indian people in recovering 90 million acres of reservation land and numerous religious and cultural sites outside the reservations.

The Foundation is governed by an eleven-member board of directors drawn from throughout Indian Country but also including non-Indians with expertise in Indian land-related topics, specifically land appraisal and financing. Over the past fifteen years the board of directors has involved people with virtually every view point related to Indian land—individual land owners, tribal land staff, elected leadership, farmers and ranchers, business owners, federal government officials and young Indian people.

Over the first fifteen years of operations ILTF has provided program services, grants or loans to more than 225 Native nations and a fair number of Alaskan native villages; more than $42 million has been distributed in support of land-related work in Indian Country. ILTF has assisted twenty-eight Native nations in the direct recovery of lands that were important to them. The Foundation also maintains 29 separate donor-advised funds for various land projects and Indian organizations.

Indian Land Capital Company (ILCC), a subsidiary of ILTF, is a for-profit Community Development Finance Institution. ILCC makes full-faith-in-credit financing available to Native nations for the purchase of land; land is never taken as collateral. ILCC has financed approximately $15 million in land purchases (31,000 acres) in its nine years of operation however two recent large capital injections should allow the company to nearly triple the total lending within a year.

ILTF also created the National Tribal Land Association (NTLA), a collective educational and networking group for tribal land and natural resource staff. NTLA and ILTF have hosted seven annual conferences with sessions addressing all aspects of Indian land management; session presenters are predominantly the more skilled and experienced tribal land staff with the more advanced sessions presented by outside experts. In addition, six to eight credit hours of Continuing Legal Education have been presented at the conference each year. The conference attendance has grown from 110 in the first year to 360 in year seven. In January 2018, NTLA will begin a four-level certification program for Indian land professionals to encourage land staff members to continue to expand their skill levels and provide recognition for their effort.

The Foundation also has an extended history of working with a variety of federal agencies and programs including the Bureau of Indian Affairs, Office of Special Trustee, Land Buy-Back Program, Office of Appraisal Services and Office of Hearings and Appeals. In 2006, ILTF conducted the estate planning and will writing pilot project under the American Indian Probate Reform Act of 2004.

In short, the staff and board of the Foundation have a broad and deep understanding of the tribes and many different land situations that exist in Indian Country, as well as, the policies, procedures and practices that govern the use of Indian land.

NATIVE NATIONS AS SOVEREIGNS

The Native nations of this continent have long been recognized as having inherent sovereignty over their territory since long before the creation of the United States and the misapplication of the Doctrine of Discovery. Indeed, Chief Justice John Marshall even in declaring the tribes "domestic dependent nations" and suggesting that the tribes' relationship with the United States "resembles that of a ward to his guardian", he did not go so far as to suggest the tribes were incompetent to own or manage their lands. The lands of Native nations remained in their jurisdiction and ownership. It wasn't until the passage of the General Allotment Act (GAA) in 1887 and other allotment acts spawned by the GAA, that the federal government established the trust relationship with the tribes and Indian people that we know today. This relationship is based on the premise that Indian tribes and people were incompetent to handle their own affairs as evidenced by the "taking into trust" the title of the majority of Indian lands. In fact, that basic relationship is hammered home even today as Indian people seeking to have their land holdings converted from fee status to trust status often find the most expedient method to gaining approval is to declare themselves incompetent to manage their land. While in reality, their reasons may be for jurisdictional or financial purposes. Nonetheless, the paternalistic relationship with the federal government is continued and has continued for the past 130 years.

A similar situation generally exists for the Native nations in that they must go through a lengthy and costly fee-to-trust process to recover land to their jurisdiction. In the majority of cases, these are on-reservation or former reservation lands—lands guaranteed to the tribes' exclusive use and occupation through treaties or executive orders.

The relationship between the federal government and the Native nations took a dramatic shift during the Nixon Administration with the declaration of tribal self-determination as a federal policy. Today we can see the advances many Native nations have made in the intervening years including the implementation of self-governance compacts that many Native nations now work under. These agreements did not reduce the overarching trust responsibility of the federal government to protect tribal rights but did allow the Native nations to determine for themselves the directions they would move on many fronts such as economics, resource management, and governance. The Native nations have taken advantage of the ever increasing skills and capacities of Indian people to inform and direct their advances. These skills and capacities were honed not just in the culture and teachings of the various Native nations but also in the surrounding non-Indian culture and educational institutions.

Today, there are many, many Indian people that are the drivers behind tribal programs and enterprises that compare very well with non-Indian institutions and businesses.

To summarize, Indian Country as a whole is well past the notion of the blanket declaration of Indians as incompetents. This particular legislation recognizes that fact and promotes Native nation self-determination.

NATIVE NATION LAND MANAGEMENT

The Foundation's experience in working with many, many Native nations and through the National Tribal Land Association's conferences, it is readily apparent that the skill levels, competencies and capacities of tribal land staffs fall along a continuum from absolutely none to a level higher than many of the large land corporations in the country. An example of the former is the Ponca Tribe of Oklahoma. When ILTF began working with the Tribe, their only map of tribal and individual allotments on the reservation was a single 8 ½ by 11 inch sheet of paper with trust lands drawn by hand in red ink—provided by the local BIA agency! An example of the latter is the Couer d'Alene Tribe that provides contracted titling and records services for the county.

Obviously the most significant factor that affects the Native nation's ability to advance their own land management is the availability of funding. However, this can also be a chicken-egg conundrum. Much of Indian land is leased to outside interests. The leasing process that has developed over the years at many of the poorer reservations relies heavily on the BIA staff to process lease renewals. As shown during the Cobell lawsuit, rarely have these leases actually returned fair market value to the Native nations and individual Indian landowners. If they were to achieve the higher value, the nation would have enough funds to hire staff and manage the leasing process. An example of this is the functioning of the Rosebud Tribal Land Enterprise (TLE); TLE averages twenty to thirty percent higher lease rates than other non-managed allotments on the reservation. This easily returns sufficient funds to operate TLE and turn a profit for the Tribe and tribal member shareholders.

Functionally what it would mean for Nations that have their own competent land staff and land ownership in restricted fee status is that virtually every land activity by Native nations that now requires the lengthy, time consuming Secretarial approval could be shortened by months, if not years. The many commercial development projects which dissolved because of the length of time in gaining approvals could now get done much more expeditiously.

Clearly it is ILTF's intention to raise the level of skills and competencies of tribal land staffs through our work with NTLA and hope that more Native nations could take advantage of managing their own lands as offered by this legislation.

TRUST TO RESTRICTED FEE STATUS

While H.R. 215 proposes to allow the Native nations to identify trust land to convert to restricted fee, if the nations cannot get land converted from fee-to-trust then moving land to restricted fee will largely be limited to those lands the nations hold in trust currently or the process will most certainly slow over time. The Foundation would propose that the legislation contain language to allow for the Native nations to identify fee land as well as trust land to convert to restricted fee. An expedited process, particularly for on-reservation fee lands, could accelerate not only the process to get land into restricted fee status but also reduce the current backlog of fee-to-trust applications. The cost and time savings by bypassing the fee-to-trust process could be advantageous to both the Native nations and federal government.

The Native nations throughout the country have accelerated their acquisitions of land over the past thirty years due to the expanded economic activity in Indian Country. In many cases the nations are focused on recovering the reservation lands that were lost through the allotment processes. In other instances the nations that had federal recognition terminated and regained are trying to re-establish a land base. In either instance, the nations are interested in establishing tribal jurisdiction as soon as possible.

Currently, the only option for most Native nations to have land clearly within their jurisdiction is to apply to have the land put into trust status. The fee-to-trust process can take anywhere from nine months to decades to complete. The result is considerable amounts of land in Indian Country remains undeveloped or underutilized for long periods of time. If the provisions in this legislation were extended to fee land transitions to restricted fee status, Native nations and the federal government could ultimately stream line processes and save considerable expense.

VOLUNTARY NATURE OF THE TRANSITION

The voluntary nature of the trust-to-restricted fee status conversion as outlined in the legislation is a necessity for acceptance by Indian Country. The individual Native nations must have the ability to identify the lands of their choosing and not be forced to convert any additional lands without their consent. Any rules and regulations written for implementing this legislation must not result in any additional restrictions beyond the alienation and taxation. Inserting language to ensure the Secretary understands this limitation would be prudent.

PERMANENT STRUCTURES ON TRUST PROPERTY

In December, 2010 the Albuquerque School Act passed into law including a technical amendment to the American Indian Probate Reform Act of 2004. The amendment directed that permanent structures on Indian trust or restricted land would no longer be considered trust property and would be considered fee property. The effect of this change is that two distinct ownerships were created for trust and restricted allotments with existing permanent structures—the underlying trust or restricted land interests and the permanent structure fee interests. The ramifications of this change have been substantial and may continue to grow over time unless corrected.

The most immediate effect concerned probate of estates involving these allotments. The Office of Hearing and Appeals (OHA) only probates trust and restricted fee assets and fee assets are probated in state court. The intention is for OHA to probate the trust assets (land) and forward the order to the state court and request a similar division of fee assets (structures) among the heirs. However, very few state probate laws reflect those provisions found in AIPRA. It is likely, given the level of fractionation of Indian land title, that the two ownership interests (land and structures) will diverge dramatically.

The second significant effect arose during the Cobell Settlement and the Land Buy-Back Program (LBBP). Initially, LBBP avoided purchasing undivided interests in allotments with permanent structures on the land. More recently the LBBP began acquiring interests in those allotments under pressure from the tribes but did so only if the tribal council submitted a

resolution promising a lease for the structures would be issued. As the Secretary is only purchasing trust interests as authorized by the Indian Land Consolidation Act of 1983, the undivided interest owners retain their existing interests in the permanent structures.

Recording and maintaining title records will exacerbate the situation. DOI maintains the ownership records on trust and restricted assets but not fee assets. Fee property assets are usually maintained by the counties but as these permanent structures are associated with trust or restricted land, the counties have not and will not track the ownership. Fundamentally, there is no chain of title for the permanent structures. Legal action over the ownership of the permanent structures looms.

In the spirit of this proposed legislation, ILTF would propose a solution to this situation by including language in H.R. 215 that recognizes permanent structures on trust and restricted allotments as "restricted fee assets associated with trust and restricted fee land". This action would allow OHA to probate the allotment as a single ownership. It would also maintain the limitation on the liabilities of DOI for management and tracking of the permanent structures that seems to have been the impetus for the amendment.

CONCLUSIONS

Many of the Native nations and Indian people have recognized that Indian Country is impeded in their efforts to maintain a modicum of sovereignty by the basic trust land relationship that exists. At the Foundation one of our favorite sayings is, "Nothing says sovereignty like asking for the Secretary's permission!" I would suggest this legislation is one more step toward actualizing full Native nation sovereignty in a relationship of many sovereign nations inside one sovereign nation.

There are many Native nations that are ready to take that step and others who believe that their lands can only be protected by being held in trust. By allowing each Native nation to decide which, if any, of its lands it will directly manage, the Nation can build confidence in this approach and develop its management capacity over time and not be inundated through an "all or nothing" approach.

ILTF would encourage the Committee to entertain language changes to the legislation that address three issues:

- Allow for the conversion of Native nation-owned fee lands directly to restricted fee status without going through the fee-to-trust conversion;
- Clarity in directions to the Secretary of the Interior that the rules and regulations for implementation of this legislation cannot include any other restrictions on these restricted fee lands than is outlined within the legislation; and,
- Changes the designation of permanent structures on trust and restricted fee lands from non-trust assets to restricted fee assets associated with trust and restricted fee land.

The Foundation would be happy to provide additional information regarding the positions outlined above or work with the Committee's staff in developing the additional language for the legislation.

Pidamayaye. Thank you for affording me this opportunity to share my views on this important topic.