SUPPLEMENTAL TESTIMONY
OF
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Chief of the Miami Tribe of Oklahoma
Before the
House Committee on Natural Resources
Subcommittee for Indigenous Peoples of the United States

August 15, 2019

Chairman Gallego and Honorable Members of the Subcommittee for Indigenous Peoples of the United States:

I write to supplement the testimony I submitted to the Subcommittee on July 16, 2019 in order to respond to the two questions for the record (QFRs) submitted by Congressman Rob Bishop and received by me on August 5, 2019 regarding **H.R. 396**, a bill to provide for the equitable resolution of certain Indian land disputes regarding land in Illinois, and for other purposes. I want to thank Representative Bishop for his questions and the Subcommittee for the opportunity to respond to them.

Congressman Bishop posed two questions:

1. Can you clarify what the Miami Tribe estimates that their land claims in Illinois, as contemplated in H.R. 396, are worth?
2. Can you provide the Committee with detailed information and materials regarding the Miami Tribe of Oklahoma's claim of ownership pursuant to any treaties and how these differ from other tribes' claims related to the Treaty of Grouseland?

I will respond to the questions in the order posed by the Congressman.

QFR 1. Can you clarify what the Miami Tribe estimates that their land claims in Illinois, as contemplated in H.R. 396, are worth?

Congressman Bishop asks the Tribe to estimate the value of the land claim contemplated by H.R. 396. For context, the Congressman cites testimony from two Congressmen provided during a hearing before the Committee on Resources in the 107th Congress on H.R. 791, a bill that similarly would have resolved cloud on title for Illinois landowners in exchange for the right of the Miami Tribe of Oklahoma to bring its land claim based on the Treaty of Grouseland against the United States in the Court of Federal Claims ("CFC").

Specifically, Congressman Bishop cites testimony from Congressmen David Phelps and Frank Pallone indicating that the Tribe believed the value of its claim to be approximately $30 billion.

While the ultimate value of the Tribe's claim is an understandable question to raise in assessing the impacts of H.R. 396, it is important to reemphasize at the outset that H.R. 396, like H.R. 791, does not evaluate the merits of the Tribe's claim. Rather, the Bill leaves both liability and damages to the exclusive jurisdiction of the CFC. It is not clear where Congressmen Phelps and Pallone came up with the estimate that was attributed to the Tribe,[1] and I have been reluctant to estimate the possible value of the Tribe's claim, not for lack of transparency, but because it is enormously difficult to evaluate with any precision. A brief description of how damages would be calculated before the CFC is instructive.

If H.R. 396 is adopted, the Tribe would first be required to prove the merits of its land claim to the satisfaction of the CFC *before any* damages would be awarded by the CFC. So, if the Tribe fails to prove its claim, the value of that claim will be zero. In contrast, if the Tribe is successful on the merits, the amount of damages the Tribe is entitled to would be thoroughly litigated, with the ultimate amount of damages being calculated based on a variety of factors determined by the CFC, and not the Tribe, including 1) the types of damages allowed, 2) the amount of land determined to be encompassed within the Tribe's claim, 3) assessments of historic land *value at the time of the loss*, and, of course, 4) deductions or setoffs that the CFC deems appropriate. With all of these factors at play, it is nearly impossible to gauge with any certainty the ultimate value of the Tribe's claim should it be successful on the merits before the CFC.

Although offering definitive predictions of claim value is little more than pure speculation at this stage, I want to dispel any notion that the Tribe currently values its land claim at $30 billion. As stated above, I am not aware of the source of the $30 billion figure or how it was calculated, but it does not represent the Tribe's estimation of value at this juncture. Nevertheless, if forced to predict a range of damages, and accounting for the fact that the Tribe must first prevail on its legal claim before any damages would be awarded, the Tribe's rough estimate is that the claim value could range from nominal value to $12 billion dollars depending on a variety of factors that are difficult to assess at this stage. And as I stated in my testimony before the Subcommittee on July 16, 2019, any damages the Tribe is ultimately awarded through a judgment from the CFC would be paid out of the federal Judgment Fund without the need for any new appropriations by Congress.

Finally, it bears emphasis that H.R. 791—the bill introduced in the 107th Congress that would have accomplished the same underlying goals as H.R. 396—garnered strong support from

[1] The testimony of Floyd E. Leonard, Chief of the Miami Tribe of Oklahoma, on H.R. 791 does not reference that estimate.

members of the Committee on Resources notwithstanding the estimates of the value well in excess of the Tribe's current rough evaluation. Specifically, after Congressman Phelps referenced the $30 billion figure, he went on to state:

> I am in support of Congressman Johnson's legislation, H.R. 791, and I commend him for his leadership on this issue, *which will place this issue's accountability where it belongs, with the Federal Government*. This is not a question of who is right and who is wrong, the Miami Tribe or the landowners. This is a question of who is going to take responsibility.[2]

Many others echoed Congressman Phelps' support, acknowledging that the Tribe should be given the opportunity to right serious historic wrongs, the responsibility for which, if proven, would fall on the United States and not the landowners of Illinois. For example, Congressman Timothy Johnson, the sponsor of H.R. 791, clarified that the legislation "enjoyed widespread support" and expressed that, while H.R. 791 (like H.R. 396) *did not* render a judgment on the merits of the Tribe's claim, "there is no question there have certainly been examples throughout history of wrongs committed on Native Americans."[3] Similarly, Speaker Dennis Hastert referred to H.R. 791 as "commonsense legislation" and stressed that the merits of the Tribe's claim based on the Treaty of Grouseland "can and should be made by experts."[4] Likewise, Congressman John Shimkus, whose district currently includes the lands subject to the Tribe's claim, described H.R. 791 as "straightforward and fair to both sides."[5]

As I have indicated in past testimony and in meetings with many members of Congress, the Tribe has remained committed to working with Congress to secure a legislative solution to the title issue, notwithstanding the fact that H.R. 791 did not become law and was not reintroduced in subsequent Congresses for a variety of reasons.[6] The Tribe proposed the language of H.R. 396 out of respect for the same commonsense, equitable, and just approach of H.R. 791, and in light of the broad support that it enjoyed in the House. And H.R. 396, like H.R. 791, leaves the decision on merits of the Tribe's claim where it belongs: with the experts at the

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[2] *Legislative Hearing on H.R. 521 and H.R. 791 Before the Committee on Resources, U.S. House of Representatives*, 107th Cong. 7 (2002), *available at*:
https://www.govinfo.gov/content/pkg/CHRG-107hhrg79494/pdf/CHRG-107hhrg79494.pdf
(prepared statement of Congressman David Phelps) (emphasis added).

[3] *Id.* at 3 (testimony of Congressman Timothy V. Johnson).

[4] *Id.* at 79 (prepared statement of Congressman J. Dennis Hastert, Speaker of the U.S. House of Representatives).

[5] *Id.* at 5 (prepared statement of Congressman John Shimkus).

[6] *Id.* at 127 (prepared statement of Chief Floyd E. Leonard of the Miami Tribe of Oklahoma) (stating that "fair and reasonable" federal legislation is the most appropriate vehicle for an expeditious resolution of the recognized treaty title claims of the Miami Tribe of Oklahoma to land, and related rights and interests, in the State of Illinois). Chief Leonard became ill and passed several years later, not having seen his goal of a legislative resolution of the Illinois land claim achieved.

CFC. I urge you to support H.R. 396 for the same reasons articulated by your colleagues in the 107th Congress.

QFR 2. Can you provide the Committee with detailed information and materials regarding the Miami Tribe of Oklahoma's claim of ownership pursuant to any treaties and how these differ from other tribes' claims related to the Treaty of Grouseland?

I appreciate the opportunity to clarify for the record the basis of the Tribe's claim and how that claim relates to any similar claims of other signatories to the Treaty of Grouseland.

The Miami Tribe of Oklahoma is the sole contemporary tribal body politic with a treaty title claim under Article IV of the Treaty of Grouseland. As explained below, the Eel River Miami have for over a century been a part of the Miami Tribe of Oklahoma. The Wea, now a part of the Peoria Tribe, ceded their 1/3 interest in the reserved land in 1818.

Because the recognized title granted to the Tribe under the Treaty of Grouseland is central to its claim, a brief history surrounding the Treaty of Grouseland is instructive. Historically, the Miami Indian confederacy consisted of major group of people located in the Native diaspora that existed just south of the central Great Lakes when the French penetrated the lakes in the 1620s. Within the confederacy, the three bands that consistently intermarried and forged a clear alliance as a "tribe" were the Miami Proper, the Eel River Miami, and the Wea.

Throughout the Eighteenth Century, the Miami confederacy came into increasing contact with fur traders at trading posts established throughout the region. In 1801, the federal government sent a territorial governor, William Henry Harrison, to administer the region occupied by the Miami confederacy. The encroachment of non-Indians on Indian lands generated tensions and made clear the need for the United States to negotiate Indian treaties and purchase land. From 1802 to 1804, Harrison negotiated a series of land cession treaties with various tribes,[7] including a series of 1804 treaties that cleared a path for non-Indian occupation along the north bank of the Ohio all the way to the Mississippi River.[8] The Miami disputed many of the agreements, arguing that they had rightful claim to large swaths of the lands ceded.

The mess caused by Harrison's approach and the resulting treaties set the stage for the Treaty of Grouseland. On August 21, 1805, the three Miami bands ceded a small strip of land in present-day southern Indiana. In exchange for this cession, the Miami demanded and received acknowledgement of ownership to the vast regions of the Wabash River watershed, some of this

[7] *See* Treaty with the Delawares, Etc., June 7, 1803 (7 Stat. 74); Treaty with the Eel River, Etc, Aug. 7, 1803, (7 Stat. 77).
[8] *See* Treaty with the Delawares, Aug. 18, 1804 (7 Stat. 81); Treaty with the Piankeshaw, Aug. 27, 1804 (7 Stat. 83).

land being west of the Wabash River in present-day Illinois.[9] Because of Harrison's past practice of attempting to negotiate cessions from more "cooperative" tribes regardless of their title to the land, and the mess he had made in the 1802-1804 treaties, the Miamis, Eel River, and Weas insisted on the reservation of land as joint owners with an undivided interest in the whole,[10] and further secured the United States' express agreement to "not purchase any part of the said country without the consent of *each* of the said [three] tribes."[11]

The Article IV reservation of lands vested the Miami, Eel River, and Weas with *treaty recognized title* to lands on the Wabash and its waters above the Vincennes, including the area in Illinois subject to the Tribe's claim under H.R. 396.[12] Because Article IV vested the Tribe with treaty recognized title, the United States was thereafter required to provide compensation to the Tribe under the Fifth Amendment of the United States Constitution if that title was subsequently taken.[13] The Tribe's treaty recognized title is in contrast to "original Indian title," which is based solely on aboriginal occupancy and use,[14] and which can be taken by the United States without compensation because it—unlike treaty recognized title—does not constitute "property" within the meaning of the Fifth Amendment.[15]

Between 1805 and 1840, the Tribe's lands came under ever increasing pressure from white settlers and the federal government, and the Tribe ultimately ceded most of its lands reserved under the Treaty of Grouseland through a series of subsequent treaties.[16] However, the

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[9] Treaty of Grouseland, Aug. 21, 1805, 7 Stat. 91.
[10] *Id.*, art. IV.
[11] *Id.* (emphasis added).
[12] *United States v. Kickapoo Tribe of Kansas*, 174 Ct. Cl. 550, 554 (Ct. Cl. 1966) (holding that Article IV of the Treaty of Grouseland "plainly recognizes title to and ownership of the designated lands").
[13] *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980) (explaining that Congressional power over tribal lands "does not extend so far as to enable the Government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation" (internal quotation marks omitted)); *Tee Hit-Ton v. United States*, 348 U.S. 272, 277-78 (1955) (explaining that although Congress has no constitutional obligation to compensate tribes for the taking of land held under original Indian title, "[w]here the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking").
[14] *Tee Hit-Ton*, 348 U.S. at 279.
[15] *Id.* at 285 (stating that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment").
[16] Treaty of September 30, 1809 (7 Stat. 13); Treaty of September 30, 1809 (7 Stat. 115); Treaty of October 6, 1818 (7 Stat. 189); Treaty of October 23, 1826 (7 Stat. 300); Treaty of February 11, 1828 (7 Stat. 309); October 23, 1834 (7 Stat. 458, 463); Treaty of November 6, 1838 (7 Stat. 569); Treaty of November 28, 1840 (7 Stat. 582). Many of these were signed under coercion, and the last was signed in 1840 shortly before the Tribe was forcibly removed by the United States to Kansas in 1846.

Tribe never ceded or otherwise relinquished title to the 2.6 million acre treaty reservation in present-day Illinois that is the subject of the land claim contemplated by H.R. 396.

Despite its lack of title, in 1821 the United States through the Illinois Land Office began selling parcels of land within the Tribe's unceded territory to white settlers until settlers fully occupied the area with United States land patents in hand. The United States did not seek or obtain consent of the Miami before making these sales in violation of Article IV of the Treaty of Grouseland, and the United States has never compensated the Tribe for the taking.

Finally, I want to briefly address your question as it pertains to other tribes' claims under the Treaty of Grouseland and how they may differ from the claim of the Miami Tribe of Oklahoma. Article IV of the Treaty of Grouseland vested "the Miamis, Eel River, and Weas" with joint ownership over the 2.6 million acres subject to the Tribe's land claim.[17] However, despite their joint ownership recognized under Article IV, the Eel River and Weas do not maintain separate claims to the tract.

The Miami Tribe of Oklahoma is the contemporary body politic of the so-called Miami Proper *and* Eel River bands that were signatories to the Treaty of Grouseland.[18] Indeed, the Eel River band was originally and has always been a part of the historic and contemporary Miami Tribe.[19] As a result, any claim to the 2.6 million acres by the "Eel River" as referenced in Article IV of the Treaty of Grouseland is exclusively vested in the Miami Tribe of Oklahoma.

The Wea also do not have a separate claim because the Wea ceded their interest in the Grouseland reserve in 1818.[20] The Wea ultimately separated from the Miami and confederated with the Peoria Tribe, which continues as the successor in interest to the Wea.[21] Under the terms of Article IV of the Treaty, the Wea cession did not affect the Miami title to the 2.6 million acres because the other signatory bands under the Treaty of Grouseland whose separate consent was required to authorize further conveyance of the tract—the Miami Proper and the Eel River Miami—never consented to the cession.[22]

While other Tribes may have ceded to the United States lands reserved to the Miami under Article IV, those cessions would have been based only on occupation and not treaty recognized title. The United States was free to obtain, and was active in obtaining, cessions from

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[17] Treaty of Grouseland, art. IV, Aug. 21, 1805, 7 Stat. 91.
[18] *See Miami Tribe of Okla. v. United States*, 2 Ind. Cl. Comm. 617, 618 (1954).
[19] Findings of Fact, *Miami Tribe of Okla., et al. v. United States*, Indian Claims Commission, Dkt. No. 253, Vol. 5, p. 181 (June 4, 1957) ("The Eel River Tribe was originally and at all times herein referred to, a part of the Miami.").
[20] Treaty with the Wea, Oct. 2, 1818 (7 Stat. 186).
[21] *Peoria Tribe of Indians of Okla. v. United States*, 4 Ind. Cl. Comm. 223 (1956).
[22] Treaty of Grouseland, art. IV, Aug. 21, 1805, 7 Stat. 91 (United States further agreed to "not purchase any part of the said country without the consent of each of the said [three] tribes").

tribes that merely occupied ceded lands without recognized title. However, those cessions could not legally diminish or otherwise affect the treaty recognized title held by another tribe in the same area. As a result, any cession in the Grouseland Reserve that the United States received from other tribes had *no impact on the Miami Tribe of Oklahoma's treaty recognized title to the 2.6 million-acre tract in Illinois, which it continues to hold to this day*. The cessions the United States received to the Grouseland Reserve from tribes without recognized title was no more effective in acquiring legal title than is a quit claim deed from an apartment renter in acquiring the title of the owner of the apartment building.

Thank you again for the opportunity to address your questions and testify in support of H.R. 396.