Questions for the Record by Republican Members
House Subcommittee for Indigenous Peoples of the United States
Hearing on H.R. 4888
February 5, 2020

Answers by The Honorable Cheryle Kennedy, Tribal Council Chairwoman, Confederated Tribes of Grand Ronde:

Question 1. Does it make more sense for the bill to authorize land claims in the tribe's former reservation area as established under its 1853 and 1857 treaties and the 1857 Executive Order, than to authorize land claims in the entire State of Oregon?

Answer: The Tribe is not seeking to "authorize" any land claims in the State of Oregon. The purpose of this bill is to correct an injustice that occurred in 1994, when the Tribe negotiated a land exchange involving 240 acres of BLM land. In exchange for this land, the Tribe agreed to extinguish any future claims to the Thompson Strip, the land to which it was ceding its rights. The intention of all the parties is clear from the statements made at the time by Congressman Kopetski and Mark Mercier, the Tribal Council Chairman. This understanding that the Tribe would only be relinquishing its rights in the Thompson Strip was also confirmed in the Committee section-by-section summary and the Committee Report accompanying H.R. 4709 (103rd Congress).

Question 2. Is the Tribe concerned that H.R. 4888 might create a cloud on the title of private property owners in Oregon?

Answer: No. The substantial majority of Indian land claim cases over the past five decades were brought pursuant to the federal Trade and Intercourse Act ("Intercourse Act"). This statute, which is also called the Nonintercourse Act, was first enacted in 1790 and is now codified at 25 U.S.C. § 177.[1] The Act prohibits the sale or transfer of Indian lands without the consent of the United States.[2]

After decades of land claim litigation involving many federally recognized Indian tribes, the legal principles behind a Trade and Intercourse Act claim have now been finally resolved, as a result of a 2005 decision by the U.S. Supreme Court, and by two subsequent decisions by the 2nd Circuit Court of Appeals.

In *City of Sherrill v. Oneida Indian Nation of New York*, the Supreme Court changed the basic legal standards for evaluating tribal land issues.[3] In its ruling, the Court relied on the

[1] Act of July 22, 1790, chap. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177).
[2] *See* 25 U.S.C. §177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").
[3] *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

equitable doctrines of laches, acquiescence, and impossibility in denying the Oneida Indian Nation the ability to re-acquire its reservation lands from third-party sellers and re-establish its sovereignty over those lands, which were within the boundaries of a reservation established by Federal treaty.[4]

The decision in *Sherrill* was followed a few months later by a land claims decision involving the Cayuga Nation of New York, in which the 2nd Circuit Court of Appeals held that the laches defense bars both the ejectment of the current residents of the claimed lands and the payment of any trespass damages.[5]

In 2010, the 2nd Circuit went further and denied even a non-possessory compensation claim by the Oneida Indian Nation. This claim involved the difference in fair market value of certain third-party land transactions with the State of New York in 1795 that were in violation of the Intercourse Act.[6]

The decisions in these cases have shut the door on a Trade and Intercourse Act lawsuit, claiming either possession or compensation, for a transfer of lands without the consent of the United States. Over the past five decades, private property owners have not been subject to a cloud on their private property rights and these federal decisions ensure no change to this status quo.

Question 3. Did any of the historic bands and tribes of the Confederated Tribes of the Grand Ronde Community file claims pursuant to the Indian Claims Commission Act? If so, what were the claims and how were they resolved by the Indian Claims Commission (ICC)?

Answer: Yes. The Appendix to this document describes the claims filed by the historic bands and tribes of Grand Ronde under the Jurisdictional Act of 1935 and the Indian Claims Commission Act of 1946, and the result in each case.

Question 4. With respect to H.R. 4888, is it the tribe's intention to file claims that could have been filed with the ICC?

Answer: The Indian Claims Commission no longer exists, and the historic bands and tribes of Grand Ronde filed and resolved the claims listed in the Appendix to this document. The Tribe acknowledges that the deadlines for filing claims under the Jurisdictional Act and the Indian Claims Commission Act have long expired.[7]

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[4] *Id*.
[5] *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2nd Cir. 2005), *cert denied*, 547 U.S. 1128 (2006).
[6] *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2nd Cir. 2010).
[7] The deadline for filing claims under the Jurisdictional Act was August 26, 1935. *See* Section 2, Law of August 26, 1935, 49 Stat. 801 (1935). The deadline for filing claims under the Indian Claims Commission Act was August 13, 1951. *See* Section 12, Indian Claims Commission Act 60 Stat. 1049 (1946).

<u>Question 5</u>. The Committee archive for H.R. 4709 (103rd Congress) includes a memo from a representative of the Grand Ronde Tribe to Committee Democratic Staff prior to the House Subcommittee on Native American Affairs hearing on the bill. The memo clearly indicates the Tribe was aware (or should have been aware) that the bill extinguished many other claims besides the Thompson Strip claim. (Of note, the language in section 2 extinguishing all land claims in Oregon was contained in all versions of the bill, from introduction to the final version cleared for the White House and signed into law.) Can you clarify the Tribe's understanding of the history surrounding the land claim extinguishment language contained in the bill?

<u>Answer</u>: Grand Ronde has searched the Tribe's records and, as of this writing, cannot find documentation about the role of this firm—Bogle & Gates—on this legislative matter. The Tribe also had no knowledge of these communications. However, the discussions in these two communications are completely consistent with the written statements of Congressman Kopetski and Tribal Council Chairman Mark Mercier—as well as the Committee section-by-section summary and Committee report—that the parties intended to extinguish claims only to the Thompson Strip.

The facsimile communication of August 4, 1994 primarily addressed acreage and land descriptions. The communication also noted the Tribe's concession that it agreed to "assume full responsibility for payments, if any are necessary, to the O&C counties for lost revenues." Finally, the proposed language for the Committee's section-by-section description of the bill, H.R. 4709, was almost identical to the extinguishment language that was presented in the final version of the Committee's section-by-section summary of the bill.

The facsimile communication of August 12, 1994 contains draft Committee Report language to accompany H.R. 4709. This language was almost identical to the language that was presented in the final version of the Committee report on this legislation.

In testifying as Tribal Council Chairwoman, I stated that the Grand Ronde Tribal Council would never have agreed to restrict its ability to receive compensation for newly discovered survey errors on its Reservation, or agree to extinguishment language that has not been discussed with, or imposed on, any other Oregon Tribe. In my testimony, I described discussing this matter with two Grand Ronde members who served on the Tribal Council when resolution of the Thompson Strip matter was being discussed. They both expressed surprise that this language was included in the bill authorizing the land exchange. Both also stated that they would never have agreed to this broad language in a negotiation over the Thompson Strip, especially since it involved a mistake in surveying the Grand Ronde Reservation by the Tribe's trustee, the Interior Department.

It defies common sense that the Tribe—in negotiating a settlement over a BLM survey error—would allow the Interior Department to: (a) reduce the acreage in the land swap from 360 acres

to 240 acres, (b) obtain a commitment from the Tribe to ensure that the O&C Counties are made whole, and (c) convince the Tribe to accept language that prohibits any type of claim within the State of Oregon.

The Thompson Strip land was only worth $2-3 million dollars and the 240 acres of BLM land in an exchange was fair compensation. A last minute sleight of hand by Interior attorneys to improve the Department's position involving future survey errors or other unknown problems where the Tribe is entitled to compensation should not be permitted to stand and should be replaced with language that respects the original understanding between the parties.

Appendix

Land Claims in Oregon under the Jurisdictional Act and the Indian Claims Commission Act

In 1935, Congress enacted a statute ("Jurisdictional Act") to confer jurisdiction in the U.S. Court of Claims to hear land claim cases brought by Oregon tribes, with a right of appeal to the U.S. Supreme Court.[8] This law provided that the Court of Claims was authorized to hear "any and all legal and equitable claims" arising from treaties, executive orders, acts of Congress, and/or the failure of the United States to uphold its treaty obligations under ratified treaties concluded with Oregon tribes.[9] This law also provided for claims "arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands" occupied by the Oregon tribes within the boundaries of any unratified treaties.[10]

In 1946, Congress passed the Indian Claims Commission Act, which provided another avenue for pursuing land claims cases for Oregon tribes, as well as other Indian tribes in the United States.[11]

What follows is a brief description of the major land claims cases in Oregon during the period before the enactment of the Western Oregon Termination Act in 1954.

A. Alcea Band of Tillamooks v. United States

Eleven tribes, including Grand Ronde, pursued claims under the 1935 Jurisdictional Act in a case started in 1940. In April 1945, the Court of Claims ruled that four of the eleven tribes—the Tillamook, Coquille, Too-too-to-ney, and Chetco Tribes—met the requirements of the Act and were entitled to recover compensation from the United States for lands on the Oregon coast to which they held original Indian title in 1855.[12]

The Court found that seven of the eleven plaintiff tribes failed to state a claim, for various reasons, and dismissed these claimants, among which was the Grand Ronde. The Grand Ronde's claims were rejected because the Court found the allegations were not sufficient under the 1935 Jurisdictional Act, or the rules of the Court of Claims, to constitute a cause of action against the United States.[13]

The Court also held that the Act of August 15, 1894, approving an agreement ceding almost 179,000 acres within the Coast Reservation for $142,600 did not constitute a taking

[8] Law of August 26, 1935, 49 Stat. 801 (1935).
[9] *Id*.
[10] *Id*.
[11] Indian Claims Commission Act, 60 Stat. 1049 (1946).
[12] *Alcea Band of Tillamooks v. United States*, 103 Ct. Cl. 494 (1945).
[13] *Id*. at 540.

without compensation, and therefore the claimants, including the Grand Ronde, were not entitled to recover.[14]

In November 1946, the Supreme Court affirmed the judgment of the Court of Claims.[15] The Court of Claims did not make a final judgment on the amount to be awarded until 1950. Once it did, Congress appropriated almost $2.3 million and authorized its distribution through the Western Oregon Judgment Act for the tribes entitled to recover damages.[16] These payments were distributed on a per capita basis, rather than being awarded to the tribes themselves.[17]

B. Rogue River Tribe of Indians v. United States

Twenty-eight tribes filed suit under the Jurisdictional Act in what became known as the Rogue River case.[18] The Court considered claims arising from seven treaties executed between the plaintiff tribes and the United States between 1853 and 1855.

The two principal bases of the claims were: (1) the United States wrongfully deprived tribes of portions of their reservation lands, which the government was obligated to provide to the tribes under the terms of their treaties; and (2) the United States, as an inducement to persuade tribes to surrender certain rights, agreed to make payments to tribes, but later failed to meet these obligations.[19] The Court did not consider the value of the lands ceded by tribes under their various treaties, only lands reserved to the tribes that were subsequently taken without compensation to the tribes.

In 1946, the Court of Claims held that seven of the tribes were entitled to recover damages under their claims, but did not determine the amounts. The Court also held that the confederated tribes residing on the Grand Ronde Reservation were not entitled under the 1855 treaty to receive exclusive rights to any specific area of land and, therefore, dismissed their claim.[20]

In 1950, the Court of Claims subsequently entered a judgment in favor of the Molalla Tribe and the Umpqua and Calapooia Indians.[21] The amounts of the judgment were relatively small (about $35,000 and $342,000, respectively) and were appropriated by the 82nd Congress.[22] These monies were also distributed to members of the tribes on a per capita basis, pursuant to the Western Oregon Judgment Act.

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[14] *Id*. at 548.
[15] *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946).
[16] Chapter XI of Public Law 82-253 (Nov. 1, 1951); *See also* Western Oregon Judgment Act, 68 Stat. 979 (1954).
[17] Western Oregon Judgment Act, 68 Stat. 979 (1954). This Act was passed on August 30, 1954, two and one-half weeks after the Western Oregon Termination Act, 68 Stat. 724 (1954).
[18] *Rogue River Tribe of Indians v. United States*, 105 Ct. Cl. 495 (1946).
[19] *Id*. at 544-545.
[20] *Id*. at 544, 548-549.
[21] *Rogue River Tribe of Indians v. United States*, 116 Ct. Cl. 454 (1950).
[22] *Id*. at 474; *See also* Chapter XI of Public Law 82-253 (Nov. 1, 1951).

C. Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States

Three tribes—the Coos, Lower Umpqua, and Siuslaw Tribes—pursued claims over lands that the tribes believed were appropriated without their consent and without the benefit of a ratified treaty. Under the authority of the Jurisdictional Act, the tribes brought suit before the U.S. Court of Claims.[23]

In 1938, the Court of Claims found that the tribes were not entitled to recover damages; that none of the tribes had rights to lands, excepting those which accrued to them under the agreement of October 31, 1892, as "[a]n unratified Indian treaty is not evidence of governmental recognition of Indian title to lands described therein."[24] The Court also held that under the 1892 agreement, the tribes had ceded to the United States "all their claim, right, title, and interest in … all the unallotted lands of the Siletz Reservation" and had been duly compensated.[25]

The plaintiffs' motion for a new trial was denied by the Court of Claims later in 1938, and the tribes' petition for a writ of certiorari before the Supreme Court was denied in 1939.[26] After the Indian Claims Commission Act was passed in 1946, the tribes focused their attention on the newly created Indian Claims Commission ("ICC"), with the hope of having their claims reheard. The Coos, Lower Umpqua & Siuslaw Tribes filed a petition with the ICC in 1951.[27] The case was dismissed by the ICC on June 11, 1952.[28]

D. Grand Ronde Claims Before the ICC

At the time of its legislative termination in 1954, Grand Ronde was in the process of pursuing two different claims before the ICC. The first claim involved an allegation that the $21,000 in consideration paid for lands ceded to the United States in 1897 and 1912 land transfers by the two Tillamook Bands was grossly inadequate and unconscionable.[29] In a 1955 ruling, the ICC agreed that the plaintiff tribes (i.e., the descendants of the two Tillamook Bands) had original Indian title to the lands in question. [30] In 1962, the ICC settled on a value of $72,162.50 for the Nehalem Band of Tillamook Indians and a value of $97,025 for the Tillamook Band of Tillamook Indians, including offsets.[31]

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[23] *Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States*, 87 Ct. Cl. 143 (1938).
[24] *Id*. at 153.
[25] *Id*. at 149.
[26] *Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States*, 306 U.S. 653 (1939).
[27] Petition 265 before the Indian Claims Commission, filed August 9, 1951.
[28] *Note*: the Tribe has been unable to obtain a copy of this ruling.
[29] *See Termination of Federal Supervision Over Property of Certain Indian in Western Oregon*, S. Rep. No. 83-1325, at 17 (1954). Section 16 of The Western Oregon Termination Act, 25 U.S.C. § 706 protected any pending land claim cases before the Indian Claims Commission at the time of termination ("Nothing in this Act shall affect any claim heretofore filed against the United States by any tribe.") (hereinafter "Senate Report").
[30] *Tillamook Band of Tillamooks v. United States*, 3 Ind. Cl. Comm. 533 (June 10, 1955). The ICC's findings of fact are at 3 Ind. Cl. Comm. 526.
[31] *Tillamook Band of Tillamooks v. United States*, 11 Ind. Cl. Comm. 26 (Aug. 27, 1962).

Grand Ronde, along with 30 other tribes, was also pursuing a claim to recover $50 million in damages for lands, timber rights, and fishing rights, which the tribes argued were taken without compensation (or with inadequate compensation) and without extinguishing Indian title.[32]

This second claim does not appear to have been successful. The Tribe believes this claim was probably included in a petition filed before the ICC by Kalapuyan-speaking tribes in August 1951.[33] This petition was dismissed by the ICC in 1954.[34]

[32] *Senate Report* at 17-18.
[33] Petition 238 before the Indian Claims Commission, filed August 8, 1951.
[34] *Note*: the Tribe has been unable to obtain a copy of this ruling.