



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: House Committee on Natural Resources Republican Members
From: Indian and Insular Affairs Subcommittee, Ken Degenfelder
(Ken.Degenfelder@mail.house.gov) and Jocelyn Broman
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Date: Wednesday, March 1, 2023
Subject: Oversight Hearing: “*Unlocking Indian Country’s Economic Potential*”

The Subcommittee on Indian and Insular Affairs will hold an oversight hearing on “*Unlocking Indian Country’s Economic Potential*” on **Wednesday, March 1, 2023, at 9:00am in Room 1324 Longworth House Office Building.**

Member offices are requested to notify Jocelyn Broman (Jocelyn.Broman@mail.house.gov) by 4:30 p.m. on Tuesday, February 28, 2023, if their member intends to participate in the hearing.

I. KEY MESSAGES

- Tribes face unique challenges and opportunities for economic development on lands considered Indian country.
- Land is oftentimes one of the most important social, cultural, and economic resources available to American Indians and Alaska Natives.
- Indian country consists of multiple different types of land statuses, trust land, fee land, and restricted fee land. Restricted fee and trust land have restrictions related to taxation, regulation, and transferability.
- Many land use restrictions imposed on Indian lands can prevent tribes and tribal landowners from developing projects, including energy and mineral development projects, and leveraging trust land as collateral to access financing for economic development, furthering the economic disparities that already exist in tribal communities.
- This hearing will explore solutions that can modernize and streamline Indian country land use requirements that support tribal self-determination, so that tribes and individual American Indians and Alaska Natives can use their land in a way that best benefits their people.

II. WITNESSES

- **The Hon. Dustin Klatush**, Chairman, Confederated Tribes of the Chehalis Reservation, Oakville, WA
- **The Hon. Joseph Rupnick**, Chairman, Prairie Band Potawatomi Nation, Mayetta, KS
- **Mr. Jason Robison**, Lands and Resources Officer, Cow Creek Band of Umpqua Tribe of Indians, Roseburg, OR
- **Ms. Wavalene Saunders**, Vice Chairwoman, Tohono O’odham Nation, Sells, AZ
[Minority Witness]

III. BACKGROUND

The United States has a unique legal relationship with Indian tribes and their members that has been established in the U.S. Constitution, treaties, federal statutes, and Supreme Court decisions.¹ U.S. law treats Indian tribes as “domestic, dependent nations”² because, while sovereign, they are located within the United States (domestic) and subject to federal power (dependent).

This relationship and subsequent obligations of the United States to Indian tribes arise in part from the cessions of millions of acres of tribal homelands by tribes to the United States.³ In return, the federal government made promises to provide for the health, education, and general welfare of tribal governments. The federal government continues to have a legal obligation and fiduciary responsibility, generally called the trust responsibility, to provide certain services to individual Native Americans and tribal governments.⁴

Today, there are 574 federally recognized Indian tribes⁵ with a population of approximately 2.8 million American Indian and Alaska Natives living in the United States.⁶ There are approximately 56 million acres of “Indian land,” of which 46 million acres belong to Indian

¹ U.S. Constitution, Article I, §2, cl. 3; *Cherokee Nation v. Georgia* (1831); *Seminole Nation v. United States* (1942). See Indian Health Service, “About Us,” <https://www.ihs.gov/aboutihs/> (last accessed September 19, 2018) (collecting statutes that apply to the provision of health care services for Native Americans); U.S. Dept. of the Interior, Bureau of Indian Affairs, “Frequently Asked Questions: What is the federal trust responsibility?” <https://www.bia.gov/frequently-asked-questions>.

² Chief Justice John C. Marshall. *Cherokee Nation v. Georgia*. 30 U.S. 1 (1831); *Worcester v. Georgia*. 31 U.S. 515 (1832).

³ Indian Land Cessions 1784-1894. Charles C Royce, U.S. Bureau of American Ethnology. 18th Annual Report, 1896-97. 1899. <http://memory.loc.gov/cgi-bin/ampage?collId=llss&fileName=4000/4015/llss4015.db&recNum=2>

⁴ *Cherokee Nation v. Georgia* (1831); *Seminole Nation v. United States*, 1942.

⁵ U.S. Dept. of the Interior, Bureau of Indian Affairs, “Frequently Asked Questions: What is a federally recognized tribe?” <https://www.bia.gov/frequently-asked-questions>.

⁶ U.S. Census 2019 American Community Survey. https://data.census.gov/cedsci/table?q=United%20States&g=0100000US&tid=ACSDP1Y2019.DP05&vintage=2017&layer=state&cid=DP05_0001E

tribes and over 10 million acres belong to individual Indians.⁷ Additionally, there are approximately 44 million acres of land in Alaska that are owned in fee simple by Alaska Native Corporations under unique terms established by Congress to settle aboriginal land claims in Alaska.⁸ Although tribes are sovereign governments, some suffer extreme health and social disparities and poverty in comparison to other non-native communities.⁹ These disparities contribute to higher rates of unemployment in Indian country¹⁰ and an underdeveloped business and entrepreneur environment.¹¹

For many Indian tribes and Alaska Natives, real property holdings are the basis for social, cultural, and religious life and often, their single most important economic resource. Typically, Indian lands primarily fall into one of three categories: trust, fee, and restricted fee.

Trust Lands: Land that is owned and managed by the United States through the Department of the Interior (DOI), that is held in trust for the benefit of an Indian tribe or individual Indians. Trust land preempts State tax and regulatory authority. Trust land is also inalienable.

Fee Lands: Fee simple land owned by an Indian tribe or individual Indian that can be freely alienated or encumbered without federal approval.

Restricted Fee Lands: Fee simple land that an Indian tribe or individual Indian may own and hold title but is subject to a restriction against alienation, and taxation.

Collateral and Land Base

Having a land base is essential for an individual or business to participate in activities such as agriculture, grazing, timber, energy development, and many others. Land or resources can often be used to leverage financing for business capital.

Since the formation of the U.S., Indian lands have diminished significantly, in large part because of federal policy. By 1886, Indian lands had been reduced to about 140 million acres.¹² Federal policy encouraging assimilation in the late 1800's and early 1900's further reduced Indian lands by two-thirds, to about 48 million acres by 1934.¹³ In 1934, Congress passed the Indian Reorganization Act (IRA),¹⁴ which was intended to improve the Indians' economic status by

⁷ FY 2021 BIA budget justification at IA-TNR-17. https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/BIA_FY2021_Greenbook-508.pdf

⁸ Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §1617 et seq.

⁹ <https://www.ihs.gov/newsroom/factsheets/disparities/>

¹⁰ Bureau of Labor Statistics, Unemployment rate for American Indians and Alaska Natives at 7.9 percent in December 2021. Jan. 26, 2022. <https://www.bls.gov/opub/ted/2022/unemployment-rate-for-american-indians-and-alaska-natives-at-7-9-percent-in-december-2021.htm>.

¹¹ Board of Governors of the Federal Reserve System. *Growing Economies in Indian country: Taking Stock of Progress and Partnerships*. At 8. 2012. <https://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>.

¹² <https://www.nps.gov/articles/000/dawes-act.htm>

¹³ Cohen's Handbook of Federal Indian Law. At 73. 2012.

¹⁴ Act of June 18, 1934, 48 Stat. 985 (25 U.S.C. 465), amended by P.L. 100-581, 102 Stat. 2941.

ending the loss of tribal land and facilitating tribes' acquisition of additional acreage and the repurchase of former tribal domains.¹⁵

While the IRA did help tribes reacquire land, the land is owned by the federal government for the benefit of an Indian tribe, so called "trust land." As such, trust land is subject to federal oversight with respect to leasing, selling, or encumbering the land. If an Indian tribe seeks to conduct activities on trust land, the Secretary of the Interior must approve the activity. The bureaucratic approval process can hinder economic activity with uncertainty and bureaucratic roadblocks.

For example, a tribe seeking to lease land for a business would need approval from the Bureau of Indian Affairs (BIA), which can be a lengthy, costly, and time-consuming process.¹⁶ Furthermore, tribal title records managed by the BIA are not always accurate—whether due to decades of federal mismanagement or the growing problem of fractionated land—leaving investors and prospective business partners wary of conducting business on tribal land.¹⁷ In addition, land into trust applications often take years to resolve due in part to environmental review.

The many land use restrictions imposed on Indian lands prevent tribes and tribal landowners from leveraging trust land as collateral to access financing for economic development, which "eliminates a major source of equity and security for loans."¹⁸

Land use restrictions can also translate into a lack of physical infrastructure on or near reservations, usually due to underinvestment and the rural or extra-rural character of the area. Tribes and native communities often lack sufficient or adequate facilities and related infrastructure to support prospective businesses.¹⁹ Tribal roads are underdeveloped, and tribal communities have limited access to public or private transportation options.²⁰ Basic utilities such as water, sewer, electricity, and broadband internet, remain underdeveloped.²¹

The lack of infrastructure development in many parts of Indian country creates another self-fueling problem: developing a workforce. Without meaningful workforce development opportunities, prospective entrepreneurs lack mentorship, connections, or training opportunities. In turn, much of Indian country suffers from high unemployment rates²² and underdeveloped

¹⁵ Cohen's Handbook of Federal Indian Law. At 81. 2012.

¹⁶ 25 C.F.R. § 162.438. Alternatively, a Tribe could streamline that process by developing its own leasing code under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (the HEARTH Act), Pub. L. 112-151, 126 Stat. 1150, although such codes are also subject to BIA review and approval.

¹⁷ *Id.* at 9.

¹⁸ Board of Governors of the Federal Reserve System. *Growing Economies in Indian country: Taking Stock of Progress and Partnerships* at 8. 2012. <https://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>

¹⁹ *Growing Economies in Indian country: Taking Stock of Progress and Partnerships*. At 9. <https://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>

²⁰ *Id.*

²¹ *Id.*

²² Bureau of Labor Statistics, Unemployment rate for American Indians and Alaska Natives at 7.9 percent in December 2021. Jan. 26, 2022. <https://www.bls.gov/opub/ted/2022/unemployment-rate-for-american-indians-and-alaska-natives-at-7-9-percent-in-december-2021.htm>.

business environments.²³ This is also exacerbated by a general lack of financial management knowledge and experience, poor credit scores, significant under or unbanked populations, and a lack of intergenerational business mentors amongst tribal members.²⁴

Land Laws at Issue: The Non-Intercourse Act and the Long-Term Leasing Act

In 1834, with the enactment of the Non-Intercourse Act,²⁵ land transactions with Indians were prohibited unless authorized by Congress. It reserves the exclusive right to the United States to acquire Indian lands. The Act was intended to protect Indian tribes by preventing the loss of their lands except by treaty. It did so by preventing the transfer, sale, lease, or other conveyance of land owned by an Indian tribe to third parties without federal approval. This prohibition applies to both trust and fee lands, regardless of the source of money used to obtain the lands. Over the centuries, several acts of Congress providing for the acquisition, conveyance, and leasing of land in trust for Indians have had the effect of superseding the Non-Intercourse Act even though this Act has never been repealed.

In recent years, the Non-Intercourse Act has generally not interfered with the ability of a tribe to buy, sell, or lease land that it owns in fee simple. However, the Non-Intercourse Act has generated a great deal of litigation throughout history, which has resulted in several court decisions on the issue. Although the purpose of the Non-Intercourse Act is viewed by some as quite outdated, the U.S. Supreme Court in 2005 said it “remain[s] substantially in force today...[and] bars sales of tribal land without the acquiescence of the Federal Government.”²⁶ In addition, some tribes have encountered interference with economic development and the creation of jobs, when title insurance companies have interpreted the Non-Intercourse Act to apply to real estate owned by the tribes and would not grant title insurance.

There is precedent for tribes to seek legislation to waive the Non-Intercourse Act, for transactions of non-trust land over an abundance of caution by both the tribal and non-tribal parties. From the 113th -115th Congresses, nearly identical bills were enacted into law allowing tribes in Minnesota, Oklahoma, and Oregon to lease or transfer fee land the tribe owned.²⁷ Congress has also enacted several other pieces of legislation authorizing several tribes to sell specific lands.²⁸

In 1955, Congress passed what is commonly known as the Long-Term Leasing Act²⁹ (LTLA), in part to overcome some of the limitations of the Non-Intercourse Act. The LTLA generally authorizes any Indian lands held in trust or land subject to a restriction against alienation, to be

²³ Board of Governors of the Federal Reserve System. *Growing Economies in Indian country: Taking Stock of Progress and Partnerships*. At 8. 2012. <https://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>.

²⁴ Board of Governors of the Federal Reserve System. *Growing Economies in Indian country: Taking Stock of Progress and Partnerships*. At 8. 2012. <https://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>

²⁵ 25 U.S.C. § 177.

²⁶ *City of Sherill v. Oneida Indian Nation of New York*, 544 U.S. 197, 204 (2005).

²⁷ See P.L. 113-88, P.L. 114-127, P.L. 115-179.

²⁸ See P.L. 102-497, 106 Stat. 3255; P.L. 107-331, 116 Stat. 2834; P.L. 103-435, 108 Stat. 4566; P.L. 105-256, 112 Stat. 1896, P.L. 106-217.

²⁹ 25 U.S.C. § 415.

leased by the Indian owner, subject to the approval of the Secretary of the Interior, for “public, religious, educational, recreational, residential, or business purposes...” for “a term of not to exceed twenty-five years” except for grazing purposes, in which case the term shall not exceed ten years.³⁰ The original 1955 Act did however, specify that non-grazing leases may be renewed up to one additional term of 25 years, for a total of 50 years.³¹

Congress has amended the LTLA more than 50 times to adjust the terms and conditions of leases of Indian lands, and to authorize specific Indian land or tribes to lease land for a term of up to 99 years, subject to approval of the Secretary. Most recently, the LTLA was amended to provide additional leasing authority for the Confederated Tribes of the Chehalis Reservation,³² the Navajo Nation,³³ the Pueblo of Santa Clara³⁴ for terms up to 99 years.

Lease authority up to 99 years is often needed for long-term commercial leases and for some financing contracts. Ensuring tribes can negotiate effectively, and on the same playing field as other landholders can clear the way for further economic development, especially in rural or extra rural areas. In 2022, the Confederated Tribes of the Chehalis Reservation testified specifically on how expanded leasing authority would bolster its economic development plans and how these activities can help fund its government programs and helps to diversify its economic interests.³⁵

While Congress has exempted certain tribes from the limitations of the Non-Intercourse Act, a serious consideration to support tribal self-determination would be to ensure that no federally recognized tribe encounters inference from the Non-Intercourse Act will need to seek relief from Congress. Similarly, the LTLA has been amended over 50 times to extend authority to certain tribes to lease their trust land for a period of up to 99-years. By proactively extending this authority to all federally recognized tribes, economic development plans can proceed on a more expedited path.

Restricted Fee Land and Potential Development Benefits

Restricted fee lands are lands owned by a tribe or a tribal member that are subject to a restriction against alienation or encumbrance. Such restriction is contained in the conveyance instrument, pursuant to federal law, or because federal law imposes it.³⁶ Restricted fee land can refer to land owned by a tribe or by an individual tribal member as an allotment. Congress’s broad restriction against alienation of land involving tribes includes restricted fee lands.³⁷ The approval of the Secretary is required to alienate restricted fee lands, unless Congress provides otherwise.³⁸ Also

³⁰ P.L. 255. Ch. 615, Sec. 1, 69 Stat. 539.

³¹ *Id.*

³² P.L. 117-346.

³³ P.L. 115-325.

³⁴ P.L. 115-227.

³⁵ <https://docs.house.gov/meetings/II/II24/20220914/115095/HHRG-117-II24-Wstate-PickernellH-20220914.pdf>.

³⁶ 25 C.F.R. §§151.2(e), 152.1(c); see also DOI, Solicitor’s Opinion M-37023, “Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands,” January 18, 2009, at <https://www.doi.gov/solicitor/opinions>. Hereinafter, M-Opinion 37023.

³⁷ 25 U.S.C. §177.

³⁸ 25 C.F.R. §152.22.

like tribal trust lands, restricted fee tribal lands can be encumbered; depending on the length and type of encumbrance and DOI approval may be required.³⁹

For some purposes, Congress has defined tribal lands to include both trust and restricted fee lands, such as for leasing Indian agricultural lands, rights-of-way, and Indian energy projects.⁴⁰ For practical purposes, trust and restricted fee lands often are treated the same, however it is important to note that for restricted fee land, the title of the land is held by the tribe or individual Indian or Indian tribe, whereas with trust land, the title is officially held by the federal government. Congress does not often enact statutes that impose specific duties on DOI with respect to restricted fee lands. Thus, DOI may have certain land management responsibilities to trust lands, due to the federal-tribal trust relationship, but those responsibilities do not pertain to restricted fee lands.⁴¹

Congress should look at innovative solutions to give tribal governments more control over their land and extend authority to convert land into restricted fee title through which the tribe would be solely responsible for managing it, and not subject to many applicable federal laws governing trust lands. Thus, a tribe may develop, or use its land for any purpose without the review and approval of the government and would be free to take whatever actions it deems necessary to benefit its members.

Restricted fee land would allow tribes to take full advantage of their land in ways that simply cannot be achieved if the land is fully in trust, including the ability to grant an easement or right-of-way on restricted fee tribal land without review and approval by DOI. This could be a valuable tool which would empower tribal governments to lease and regulate their own lands and eliminate federal government restrictions that interfere with tribal economic development. However, and most importantly, restricted fee would preserve the status of those tribal land as Indian Country under the sovereign authority of the tribal and federal governments.

³⁹ See, for example, 25 U.S.C. §81; 25 C.F.R. Part 84; 25 C.F.R. Part 162; 25 C.F.R. Part 169.

⁴⁰ For leasing of Indian agricultural lands, see 25 U.S.C. §3703. For rights-of-way, see 25 U.S.C. §323. For Indian energy, see 25 U.S.C. §3501.

⁴¹ M-Opinion 37023, pp. 3-4, 6.