ROBB & ROSS

JOSEPH W. ROBB A PROFESSIONAL CORPORATION

PHILIP A. ROBB
ALAN J. TITUS
ANNE C. SLATER †
JOSEPH W. ROBB **
**(1926 - 2019)

591 REDWOOD HIGHWAY, SUITE 2250
MILL VALLEY, CALIFORNIA 94941
TELEPHONE: (415) 332-3831
FAX: (415) 383-2074

STERLING L. ROSS, JR. *
*RETIRED

†CERTIFIED SPECIALIST IN ESTATE PLANNING, PROBATE AND TRUST LAW, THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

June 21, 2024

The Honorable Harriet M. Hageman
House Natural Resources Subcommittee on
Indian and Insular Affairs
1324 Longworth House Office Building
Washington, DC 20515

The Honorable Teresa Leger Fernandez
House Natural Resources Subcommittee on
Indian and Insular Affairs
1332 Longworth House Office Building
Washington, DC 20515

Re: Testimony for the Record
H.R. 1208 (Cole), To amend the Act of June 18, 1934
Hearing Date: June 26, 2024

Dear Chairwoman Hageman and Ranking Member Fernandez:

I write on behalf of Artichoke Joe's, a California cardroom, located in San Bruno, California to offer testimony for the record regarding H.R. 1208, a bill with the stated purpose of "reaffirming" the authority of the Secretary of the Interior to take land into trust for Indian Tribes. The intent of the 73rd Congress in enacting Section 5 of the Indian Reorganization Act and the legal effect of the provision have been misunderstood and misapplied. The problem is conflation of two very different types of dominion over land, one, landowner *title* to land, and the other, governmental *jurisdiction* over land.

There is a common misconception that when the federal government takes off-reservation land into trust for a tribe, the tribe not only obtains *title* to the land but also gains *jurisdiction* over the land. However, that has never been the law.

Under well-established principles governing our federalist system of dual levels of government, a state has primary jurisdiction over all lands within its borders except (1) those lands over which the federal government reserved

jurisdiction when it admitted the state into the Union, (2) those lands purchased by the federal government for the erection of needful buildings with the consent of the Legislature of the state in which the land lies (pursuant to the Enclaves Clause), and (3) those lands over which the state Legislature has ceded jurisdiction and the federal government has accepted jurisdiction pursuant to 40 U.S.C. §3112.

Absent one of the three exceptions, when the federal government acquires title to land within a state, all it acquires is the title to the land, not legislative jurisdiction over the land. The federal government is well aware of these principles. A well-known GAO publication states, "Acquisition of land and acquisition of federal jurisdiction over that land are two different things." GAO, *Principles of Federal Appropriations Law,* 3rd Ed. 2008, Vol. III, Ch. 13, p. 13-101. The Supreme Court has held that the federal government cannot strip states of jurisdiction, calling such attempt an act of "disseisin." *Fort Leavenworth Railway Co. v. Lowe*, 114 U.S. 525, 538 (1885). Thus, the federal government has no power to divest a state of its territorial jurisdiction once bestowed. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) quoting *Idaho v. United States*, 533 U.S. 262 ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow can diminish what has already been bestowed.")

This law applies to Indian lands the same as to non-Indian lands. See, for example, *Silas Mason Co. v. Tax Comm.*, 302 U.S. 186 (1937); and *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). Also compare *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) [Alaska could enforce state anti-fish-trap law on Indian reservation over which federal government did not reserve jurisdiction on state's admission] to *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) [Alaska lacked jurisdiction to enforce state anti-fish-trap law on Indian reservation over which the federal government did reserve jurisdiction at time of state's admission.]

As in *Metlakatla Indian Community*, most Indian reservations were established before admission of the state in which they sit, and thus fit the first exception as lands over which the federal government reserved jurisdiction upon admission of the state. However, that is not the case with lands procured by a tribe today. When a tribe acquires title to land that has been under state jurisdiction, the tribe obtains title but the state retains its jurisdiction. The tribe has no jurisdiction unless and until the state cedes it.

Although these principles are foundational to our federalist system and well-established, the Department of Interior seems to have violated them in adopting regulations pursuant to section 5. In 1965, the DOI adopted a regulation (25 USC §1.4) which provides that none of the laws of any State or political subdivision limiting, zoning, or otherwise governing the use or development of any real property held in trust by the US for Indians shall be applicable to that land. More recently, the section 151 regulations assume that when land is taken into trust for a tribe, whether on- or off-reservation, all state and local law is preempted.

Such a jurisdictional shift was never intended by the 73rd Congress and is not consistent with the Constitution. And this mistaken application of Section 5 is the root of the problem with off-reservation acquisitions. The mistaken belief that there is a shift in jurisdiction means that taking land into trust upends existing controls and existing communities.

H.R. 1208 is likewise based on this misunderstanding of the law and would exacerbate the problem. It seeks not only to allow land to be taken into trust for tribes but is based on the assumption that once land is taken into trust, the state loses jurisdiction over Indians on the land and state laws restricting gambling conducted by the Indians on the land are no longer applicable to the land. Thus, HR 1208 would allow off-reservation casinos to proliferate.

Before referring out H.R. 1208, we respectfully suggest that the committee address this issue and clarify that Section 5 of the IRA allows the federal government only to take title to land into trust and does not affect the federal and state jurisdiction over the land. In specific, Congress should clarify that taking land into trust is not intended to infringe on states' rightful jurisdiction over the lands taken into trust.

We appreciate your consideration of these comments.

Sincerely,

Alan Titus

cc. The Honorable Tom Cole